PETITION NOT PRINTED

# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1960

## No. 116

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STUART W. NEWSOM, PETITIONER,

*vs.*

W. FRANK SMYTH, JR.,
Superintendent of Virginia State Penitentiary.

---

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

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PETITION FOR CERTIORARI FILED NOVEMBER 3, 1959.
CERTIORARI GRANTED MAY 31, 1960.

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# IN THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND, VIRGINIA

STUART W. NEWSOM, PETITIONER, PRO SE

VS.

W. FRANK SMYTH, JR., SUPT., RESPONDENT

## AFFIDAVIT OF POVERTY

Stuart W. Newsom, the petitioner in the forthcoming petition personally appeared before me, Hugh L. Johnson, a Notary Public in and for the City of Richmond and the State of Virginia, and first being duly sworn according to law, deposes and says that he is without funds and cannot obtain funds with which to prosecute his cause. Therefore, because of his poverty he is unable to pay the fees and costs of the proceedings contemplated, nor can he give security therefore.

And he further says that he is petitioning in good faith for remedy, and that he believes he is lawfully entitled to the redress he seeks, and that he prays leave to proceed in "forma pauperis" in accordance with the statute providing for indigent's, suits; And he also prays for the appointment of an Attorney at Law to represent his cause before this Honorable Court.

And on this day below he has less than the sum of $25.92, in his spending account at the Penitentiary of Virginia; [init] HLJ

Notary's checked thereupon.

/s/ Stewart W. Newsom
STUART W. NEWSOM,
Petitioner & Affiant

Taken, sworn to and subscribed before me, in my City aforesaid in the Commonwealth of Virginia, and given under my hand and seal this 9 day of Jan. 1959.

My commission expires on the 16 day of August 1960.

/s/ Hugh L. Johnson
Notary Public
(SEAL)

[fo. 2] (File Endorsement Omitted)

IN THE
LAW AND EQUITY COURT OF THE
CITY OF RICHMOND

STUART W. NEWSOM, PETITIONER

vs.

W. FRANK SMYTH, JR., Supt., Virginia State Penitentiary,
RESPONDENT

PETITION FOR THE WRIT OF HABEAS CORPUS AD SUBJICIENDUM—Filed Jan. 12, 1959

TO: THE HONORABLE JOHN HICKS RIVES, JR., Judge of the aforesaid COURT:

On this 9 day of January 1959, by mail, COMES your aggrieved petitioner, Stuart W. Newsom, hereinafter referred as petitioner, and respectfully presents, in his own proper person, his petition for the extraordinary legal remedy provided for by statute and the Constitution of Virginia, and your petitioner states and avers in humble complaint that he is illegally confined and restrained of his liberty and held in detention by the Respondent thereof; who by virtue of his office and appointment by the executive authority is the Superintendent of the aforesaid penal institution of Virginia.

The void color of authority in law by which your petitioner is unlawfully restrained, detained and held imprisoned in the Penitentiary of Virginia, exist a denial of an Appeal, from a final judgment and Conviction, which was held in the Hustings Pt. #II, Court of the City of Richmond; and the said denial is in violation of your petitioner's right to Due Process of Law. Petitioner had been sentenced to life in the Penitentiary, of this Commonwealth, which is Null and Void ad initio, due to the deprivation and the invasion of your petitioner's Constitutional Rights; whereas, the said Constitutional Rights were guaranteed to your petitioner by the Constitutional of Virginia, Art. 1, Section 8.

## STATEMENT OF FACTS

On the 14th day of June, 1952, petitioner was arrested [fol. 3] upon warrant charging Murder, or to the effect, in the City of Richmond.

On or about the 14th day of July, 1952, an indictment was returned to the Husting Court of the City of Richmond, Part II.

The 10th day of April, 1953, defendant refused to plea, and therefore a "Not Guilty" plea was entered by the Court, on his behalf; whereas, on the same day placed on trial, and found guilty, by an undirect verdict by jury, whereas fixing sentence, which was thereafter imposed; Life in the Penitentiary, imposer, the Honorable M. Ray Doubles.

## CASE HISTORY

In this case, your petitioner have filed a petition, named Writ of Habeas; But in that said petition, he have not at any time, contended the forthcoming contention.

The first petition was filed in the Hustings Court Part one, in the City of Richmond, and thereafter appeal to the Supreme Court of Appeals, Richmond, Virginia; thereafter proceeding to the United States Supreme and into the U. S. District Court for the Eastern District of Virginia, Norfolk Division; and Richmond, Virginia and the U. S. Court of Appeals, for the Fourth Circuit. And the said petition is now, or as to the date of this petition, pending in United States Supreme Court, Washington, 25, D. C.

Please take notice, that this forthcoming petition *which is* being execued, have not contended in any way, the forthcoming contention.

* * * * *

The United States Constitution Art 1, Sec 9 provides: "The privilege of the writ of habeas corpus shall not be supended, unless when in cases or rebellion or invasion of the public safety may require it."

"Section 5848 of the Code of Virginia; Sup., Sec. 8-596

"The writ of habeas Corpus shall be granted forthwith by any Circuit Court or Corporation court, or

any judge of either in vacation, to any person who shall apply for the same by petition, showing by [fol. 4] affidavits or other evidence probable cause to believe that he is detained without lawful authority. Such petition shall enumerate any and all perevious applications of like nature and their disposition.

The aforesaid, section, is subject to the provisions of Section 17-97 of the Code of Virginia only (1) the circuit court or corporation court or any judge of either in vacation of the court or *city in which the petitioner is detained* (2) the court or any judge thereof in vacation which entered the original judgment order of conviction or convictions complained in the petition shall have authority to issue writs of habeas corpus (Code 1919, Section 5848 Acts, c. 215).

In Ex Parte Rulling, 80, Va., at page 316, the Supreme Court of Virginia, speaking through Justice P. Lewis, said:

"It is well established and undisputed principle that mere errors in proceedings of a Court of competent jurisdiction cannot be reviewed on habeas corpus. In such cases the remedy if any is by writ of error or appeal, BUT WHERE THE PROCEEDINGS UNDER WHICH THE PARTY COMPLAINING IS DETAINED IN CUSTODY ARE VOID, AS WHERE THE COURT IS WITHOUT JUURISDICTION, AND THE SAME *ARE REVIEWABLE ON HABEAS CORPUS* AND THE WILL BE DISCHARGED."

## CONTENTIONS

#1. Petitioner was denied Due Process of law and Equal Protection when the Hustings Court Part Two, of the City of Richmond, denied him an Appeal from its judgment render on the 10th day of April 1953, and in that, failing to aid sufficiently the intended appeals of the Appellant. See Exhibit "C" and "D", annexed hereto.

## CONCLUSION

Your petitioner avers that by and for the aforesaid reasons, he has shown this Honorable Court probable cause to issue a writ of habeas corpus upon the said, W. Frank Smyth, Jr., Supt., of the Virginia, State Penitentiary, at 500 Spring Street, commanding him to have the body of your petitioner before this Honorable Court at the place and times so specified therein, and for said [fol. 5] Superintendent to show cause why the Den.. of an Appeal is not dening the pefitioner his Constitutional Rights; under the Constitution of Virginia, Art. 1., Section 8, clause therein; and why the sentence in which your petitioner is now serving, should not be discharged.

In duty bound, your petitioner forever pray etc.

Et inde petit judicium.

Respectfully Submitted by:

/s/ Stewart W. Newsom
STUART W. NEWSOM,
Petitioner

*Duly Sworn to by Petitioner. Jurat Omitted in Printing.*

[fol. 6] IN THE
LAW AND EQUITY COURT OF THE
CITY OF RICHMOND

(Title Omitted)

BRIEF IN SUPPORT OF CONTENTIONS

TO: THE HONORABLE JOHN HICKS RIVES, JR., Judge of the aforesaid

Your petitioner, Stuart W. Newsom, heretofore referred to as your petitioner, shall respectfully present and show by authorities, opinions and duly certified exhibits that he has been "Denied Due Process and Equal Protection of law and because of same his sentence in which he is now serving, is null and void. See Smyth, V. Holland, 199 Va. 92 S. E. (2d) 745

• • • •

#1B. Your petitioner was denied Due Process of law and Equal Protection, when the Hustings Court, Part Two, of the City of Richmond, denied him an Appeal from its judgment rendered on the 10th day of April 1953, and in that, failing to aid sufficiently the intended appeals of the Appellant. See Exhibit "C", annexed hereto.

Your petitioner gave notice to the Honorable M. Ray Doubles, Judge of the Hustings Court Part II, on the 18th day of April, 1953, that he desired an Appeal; See Exhibit "C", and was doing all in his power to meet the requirements. But never receive any notification from the aforesaid, Judge, or from any parts of his Court.

On the 23rd day of April 1953, your petitioner again wrote the aforesaid, Judge, to the following effect: In part thereof, quote:

> ". . . Due to circumstances beyond my controal, I have been unable to complete arrangements with an attorney to complete my appeal.
>
> Therefore, I respectfully request that you appoint me counsel to appeal my case to the State Supreme Court of Appeals.

Petitioner never did receive a reply in any form, whatsoever.

Petitioner respectfully submit Constitutional Obligation No. 3., under Canons of Judicial Ethics.

[fol. 7] "It is the duty of all judges in the United States to support the federal Constitution and that of the state whose laws they administer; in so doing, they should fearlessly observe and apply *fundamental limitations and guaranttees.*

And it is said under Ancient Precedents:

"Ye shall not respect persons in judgment; but ye shall hear the samall as well as the great; ye shall not be afraid of the face of man; for the judgment is God's; and the cause that is too hard for you, bring it unto me, and I wil hear it".—Deuteronomy 1, 16-17

Your petitioner aver and plead hat the denials of his Constitutional Rights are patently obvious, and that due to the unfairness and partiality of the Judge directly concerned with the issuance thereof, the records are invalidated and Null and Void, and your petitioner are entitled to remedy in that he were grossly denied an Appeal, which is guaranteed him, and that such denial of his rights was in order to imprison him in the State Penitentiary, in wilful disregard to the Constitution of Virginia, Art. 1. Sec. 8, clause therein, and the United States Federal Constitution, Amendment Fourteen, clause therein.

It is plainly states in the Virginia Constitution Art 1, Sec., 8,—Cite in part thereof:

". . . Laws may be enacted providing for the trial of offenses not felonious by justice of the peace or other inferior tribunal without a jury, preserving the accused to an appeal to and a trial by jury in some court of record having original criminal jurisdiction."

. . .

And Section 18-12 Code, 1950) Va., submit in part thereof:

". . . A person from whom such recognizance is required may appeal to the circuit court of the county

> or corporation court of the corporation, and, in such case, the officer from whose judgment the appeal is taken shall recognize such of the witnesses . . ."

In the case of Read v. Com., 24 Gratt. (65 Va.) 618.— Petitioner shall respectfully cite:

> [fol. 8] "Right of appeal is absolute.—Where a justice of the peace requires surety of the peace of any person, such person has an *absolute right of appeal to the circuit court* of the county or the corporation court of the corporation. In the court the case is to be heard de novo upon the evidence.

It can not be said that your petitioner did not give notice in time, whereas, exhibit "C" and "D", would show contrary to the effect. In support of same, petitioner point to: V #6252 and Rule 21 of the Supreme Court of Appeals, whereas it: "require that reasonable notice be given appellee that a certificate of exceptions will be presented so that appelle can look over the certificate and given an opportunity to make known any objections he may have thereto. It was held the case of * * * 52 S.E. 2d 164, 189 Va. 248: "While the notice was indeed short it was the best the attorney for the accused could do under the circumstances; appelle's attorney attorney accepted the notice and actually appeared; and the trial judge certified that reasonable notice had been given. Hence it was sufficient notice."

In section 19-254 Code (1950) Va., I quote: "If a person sentenced by a circuit or corporation court to death or confinement in the penitentiary asks for time to apply for a writ of error, the court shall postpone the execution of its sentence for such time as it may deem proper."

"In any other criminal case wherein judgment is given by *any court and in any case of judgment* for a contempt, to which a writ of error lies, the court giving such judgment may postpone the execution thereof for such time and on such terms as it deems proper. . . ." A writ of error from the Supreme Court of Appeals shall lie to any such judgment refusing bail or requiring excessive bail."

In the case of Ramey v. Com., 145 Va. 848, 133 S. E. 755. It was held:

> "To refuse to suspend a judgment of imprisonment *is a denial of the right* to a writ of error conferred by statute. This the trial court has no right to do."

[fol. 9] The law makes essential in proceedings involving the DEPRIVATION OF LIFE OR LIBERTY, cannot be dispensed with or affected by the consent of the accused much less by his mere failure when on trial and in custody, to object to unauthorized methods; and as it is plainly said, in the case of Corrigan V. Buckley, 1926, 271 U. S. 323, 330, 331, 46 S. Ct. 521, 523, 524, 70 L. Ed 968, Cite in part thereof:

> ". . . No State Shall enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall an State DEPRIVE ANY PERSON, OF LIFE, LIBERTY, OR property, WITHOUT DUE PROCESS OF LAW; nor DENY TO ANY PERSON within its jurisdiction the EQUAL PROTECTION, of the law."

Your petitioner was denied an Appeal, from the judgment which was rendered and imposed on him, on the 10th day of April, 1953, whereas, in that, he was deprived and denied the Due Process of law and the Equal Protection of the law, which is guaranteed by the Constitutional of Virginia, and the Fourtheen Amendment of the Constitution of the United States.

The fundamental issues which this Court is being call upon respectfully to consider. Where, however, it is clear that the action of the State violates the terms of the Fundamental Charter, it is the obligation of this Court so to declare.; whereupon this issue is regard to a denial of an Appeal, which arise though prejudice. And upon same your petitioner has been denied and deprived of Due Process of Law and privileges; immunities of citizen thereof.

## CONCLUSION

In conclusion, your petitioner respectfully submits that for reasons shown in the foregoing petition, and the brief

herein and those reasons that may be shown by counsel, which may be allowed and appointed by this Honorable Court to defend the rights of the defendant, to further show he is unlawfully restrained and detained in prison, and by virtue of void processes of law; and that his cause is such a one as is proper to be brought before this Honorable Court on habeas corpus proceeding; and that [fol. 10] the writ will lie for all time to test the illegality of his present inprisonment.

For the aforesaid reasons has shown this Court probable cause to issue a writ of habeas corpus upon the said, W. Frank Smyth, Jr., Supt. of the Virginia State Penitentiary, at 500 Spring Street, commanding him to have the body of your petitioner before this Honorable Court, and place to be specified therein, together with the true cause of his detention, if any there be and to do what then and there sahll be considered concerning your petitioner, and to make return on that day specified therein why the conviction of your petitioner should not be adjudge nulities under the ture law of the land, and Petitioner pray for same.

In duty bound I forever pray etc. . . .

Respectfully Submitted by:

/s/ Stewart W. Newsom
STUART W. NEWSOM,
Petitioner

• • • •

*Duly Sworn to by Petitioner. Jurat Omitted in Printing.*

[fol. 11] IN THE
HUSTINGS COURT OF THE CITY OF RICHMOND,
PART II,

The 10th Day of April 1953.

COMMONWEALTH OF VIRGINIA, PLAINTIFF

against

STUART W. NEWSOM (W), DEFENDANT

Indictment for a Felony, No. 1

MINUTE ENTRIES OF TRIAL, VERDICT AND SENTENCE

Stuart W. Newsom (w), who stands charged with a felony, to-wit: That on the 14th day of June, 1952, he did feloniously kill and murder one James F. Brown, was this day led to the bar in the custody of the Sergeant of the City of Richmond, and also came Percy S. Smith, his attorney. The defendant, being arraigned of said offense, refused to plead. Whereupon, the Court entered a plea of not guilty on behalf of the defendant.

Whereupon, the Sergeant, having returned the Venires Facias, drawn in the manner prescribed by law, and of the number so summoned and attending, a panel of twenty names, free from exceptions for the trial of the defendant was made up and completed. And the Assistant Attorney for the Commonwealth and the attorney for the defendant, having alternately, beginning with the Assistant Attorney for the Commonwealth, each struck from the said panel, the names of four of the said jurors, the remaining twelve constituted the jury for the trial of the defendant, to-wit: Leon Adkins, Fred S. Brummer, Linwood W. Cobb, Robert H. Harvey, James M. Cary, Walker S. Smith, Rudolph C. Hassell, Harry Sachs, William G. Smith, George W. Mayo and Chas. H. Tate, who were sworn the truth of an upon the premises to speak, and having fully heard the evidence, the instructions of the Court, and arguments of counsel, were sent to their room in the custody of the City Sergeant to consult of their verdict,

and after some time returned into Court with a verdict as follows: "We the jury on the issues joined find the defendant guilty of murder in the first degree as charged in the indictment and fix his punishment at life imprisonment in the penitentiary."

[fol. 12] Whereupon, counsel for the defendant moved the Court to set aside the verdict but gave no grounds in support of his motion. Whereupon, the Court overruled the defendant's motion and the defendant by counsel excepted to the Court's ruling.

Whereupon, it being demanded of the said Stuart W. Newsom, if anything for himself he knew or had to say why the Court should not now proceed to pronounce judgment against him according to law, the said defendant arose and stated to the Court that he should not be sentenced as his attorney had failed to introduce certain evidence on his behalf and asked that he be given ten days within which to produce such evidence, which request the Court denied and to which ruling the defendant objected and excepted. Whereupon, it is ordered by the Court that the said Stuart W. Newsom be confined in the penitentiary for and during his natural life, this being the period by the jurors ascertained.

It is ordered that the Sergeant of the City of Richmond, when required so to do, deliver the said Stuart W. Newsom from the jail of this City to the Superintendent of the Penitentiary, in said Penitentiary to be confined and treated in the manner prescribed by law.

It is further ordered by the Court that the Commonwealth do recover of the said Stuart W. Newsom her costs incident to this proceeding.

Whereupon, the said defendant was remanded to jail.

Enter:

4/10/53

/s/ M. R. D.

Entered O. B. 34 Page 479

[fol. 13] EXHIBIT "C" TO BRIEF

500 Spring Street
Richmond 19, Virginia
April 18, 1953

Honorable M. Ray Doubles
Hustings Court Part II
Richmond 24, Virginia

Your Honor:

In lue of any known action on the part of my attorney, I am taking this method of respectfully noting an appeal from the 'life sentence' imposed upon me in your Court on April 10, 1953.

I will within the alloted time attempt to get Counsel to complete the appeal.

Respectfully yours,

/s/ Stuart W. Newsom
#63646

[fol. 14] EXHIBIT "D" TO BRIEF

500 Spring Street
April 23, 1953

Honorable Mr. Ray Doubles
Hustings Court Part II
Richmond, Va.

Your Honor:

Due to circumstances beyond my control, I have been unable to complete arrangements with an attorney to complete my appeal.

Therefore, I respectfully request that you appoint me counsel to appeal my case to the State Supreme Court of Appeals.

Respectfully yours,

/s/ Stuart W. Newsom
#63646

[fol. 15] COMMONWEALTH OF VIRGINIA

[SEAL]

Office of the Attorney General
Richmond

January 12, 1959

Honorable John H. Rives, Jr., Judge
Law and Equity Court
City Hall
Richmond 19, Virginia

Re: Stuart (Stewart) W. Newson
v.
W. Frank Smyth, Jr., Superintendent
of the Virginia State Penitentiary

Dear Judge Rives:

In response to a copy of a petition for a writ of habeas corpus addressed to your court in the above matter, this is to advise that the entire matter, involving the legality of the petitioner's detention, has been previously determined in habeas corpus proceedings in the State and Federal courts. Accordingly, habeas corpus does not lie in the State trial courts to further contest the validity of the detention.

Moreover, habeas corpus does not lie pursuant to Section 8-605, Code of Virginia, rendering such previous judgment conclusive. In addition, the petitioner has failed to set forth a list of such prior proceedings, as required.

Very truly yours,

/s/ T. M. Miller
THOMAS M. MILLER
Assistant Attorney General

TMM:MVH
cc: Mr. Stewart W. Newsom

[fol. 16]

500 Spring Street
Richmond 19, Virginia

January 15, 1959

Honorable John H. Rives, Jr., Judge
Law And Equity Court
City Hall
Richmond 19, Virginia

Re: Stuart W. Newsom
v.
W. Frank Smyth, Jr., Supt.
Of Virginia State Penitentiary

Dear Sir:

Received a copy of a letter to you, dated January 12, 1959, from the Attorney General, Mr. T. M. Miller.

The said, Attorney General, have erred; when stated: ". . .

> the entire matter, involving the legality of the petition's detention has been previously determinded in habeas corpus proceedings, in States and Federal Courts" . . .

Your Honor, it plainly shows, that the aforesaid, before reading the petition, made is conclusion. Whereas, on page three (3) of the petition for Writ of Habeas, under CONTENTION, number one (1), shows in regard to depravation of an Appeal, and nothing more. NOWHERE, in any other petition, in this petition's name, will you find any such contention, or anything to the effect, respective.

Whereas, in the said letter, and last paragraph, in referent to Section 8-605, Code of Virginia; whereas the said Section 8-605, states:

> "Any such judgment entered of record shall be conclusive, unless the same be reversed, except that the petitioner shall not be precluded *from bringing the same matter in question in an action for false imprisonment.*" (Code 1919, § 5857.)

Your petitioner has not act contrary to the above said, and the petition which is pending in your Court will stand upon it's face."

[fol. 17], He also states, that the petition: ". . . has failed to set forth a list of such prior proceedings as *required*,

This again plainly shows that our Honorable Attorney Gëreral, has made a great error, and therefore, shows and prove, that he has failed to read the petition, in regard to the proceedings. On page two (2) under Title, CASE HISTORY and page three (3), you will find each proceedings, respective, and the Section of law which govern same: Section 5848, of the Code of Va., Sup. Sec. 8.596, which the Attorney General referred: ". . . as required".

Your petitioner has submitted the facts, and therefore, PROTEST to the letter which shows upon it's face, in conjuction with the petition, to prove the said letter is in great error, and is liking of merits

Petition pray that this Honorable Court, take conducive, whereas, your petitioner is a layman.

In duty bound I forever pray etc, . . .

Respectfully yours,

/s/ Stewart W. Newsom
STUART W. NEWSOM,
Petitioner

[fol. 18] January 29, 1959

Mr. Stuart W. Newsom
No. 63646
500 Spring Street
Richmond 19, Virginia

In re: Petition of Stuart W. Newsom for writ of Habeas Corpus.

My dear Mr. Newsom:

Your petition for habeas corpus, dated January 9, 1959, was assigned to me as one of the judges of this Court in the routine distribution of business.

As presently advised your petition presents some questions which have not yet been settled by decision of the highest court of this State.

From time to time since receiving your petition I have been examining the authorities bear-on the questions presented. Since you have requested that counsel be assigned to you oin this matter and since the questions presented are somewhat difficult, I have, with his consent, this day appointed Mr. Edward B. Simpkins, Jr., an attorney of this City, and who is well versed in matters of this kind to represent you in this matter.

Mr. Simpkins advises that he will contact you at the Penitentiary one day next week.

Yours very truly,

/s/ Robert Lewis Young,
Judge

RLY/e

[fol. 19] IN THE
LAW AND EQUITY COURT OF THE
CITY OF RICHMOND

STUART W. NEWSOM, PETITIONER

against

W. FRANK SMYTH, JR., Superintendent of the Virginia State Penitentiary, RESPONDENT

ORDER APPOINTING COUNSEL—Jan. 29, 1959

The petitioner having prayed in his petition that an attorney at law be assigned to represent him in this cause, the Court doth appoint, with his consent, Edward P. Simpkins, Jr., Esquire, of the Richmond Bar, an attorney at law to represent the petitioner in this proceeding.

Enter

[init] R. L. Y.

Jan. 29, 1959

[fol. 20] January 29, 1959

Edward P. Simpkins, Jr., Esq.,
Attorney at Law
State-Planters Bank Building
Richmond, Virginia

In re: *Petition of Stuart W. Newsom for writ of Habeas Corpus.*

Dear Mr. Simpkins:

I enclose copy of order this day entered in the above entitled matter and copy of letter this day sent to Mr. Newsom. As presently advised, Mr. Newsom's petition complains of the following things:

First, that execution of the sentence was not suspended on his application, in which connection refers to Code Section 19-254 and the decided case of *Rainey* v. *Commonwealth*, 145 Va. 848.

Second, that eight days after the judgment he wrote to the Judge noting an appeal and advising that he proposed to get counsel of his own choice, but that thirteen days after the judgment he again wrote to the Judge advising that he was unable to get an attorney of his own choice and requesting that the Judge of the Court wherein he was convicted appoint counsel for him, which was not done.

As you know, Code Section 19-214.1 (Acts 1952, chap. 348) was the only statutory provision relating to the appointment of counsel in our Code at the time of Mr. Newsom's conviction in 1953. *Watkins* v. *The Commonwealth*, 174 Va. 518, and the several cases following it seem to settle the proposition that the Sixth Amendment to the Constitution of the United States does not apply to state court prosecutions, but that the right to counsel at least during the course of the original trial is guaranteed by Section 8 of the Constitution of Virginia, and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

[fol. 21] It also seems to be settled that the Sixth Amendment to the Constitution of the United States in giving the right to "assistance of counsel" refers to the court of original jurisdiction only and that trial and the duty to furnish counsel ends with the sentence.

Federal Digest, Criminal Law, Section 641 (1-) g, you will find the state court cases digested in the National Digest under Criminal Law, 641 (f) j. A very recent case factually in point here and squarely holding that there is no duty to appoint counsel in connection with a proposed appeal is that of *State* v. *Fisher*, 300 SW 2d, 927. On the other hand, in a recent Indiana case the contrary was held. *State* v. *Youngblood*, 75 NE 2d, 551.

Most important, to m mind, is to ascertain the meaning and effect of the recent case of *Chessman* v. *Teets*, 354 U. S. 156, in which it was held that a denial to a convicted felon of an opportunity to participate in the preparation of the record for appeal in the state court constituted a violation of the due process clause of the Fourteen Amendment to the Constitution of the United States.

Thank you most sincerely for being willing to undertake this somewhat troublesome matter.

Yours very truly,

/s/ Robert Lewis Young,
Judge

RLY/e

[fol. 23] IN THE
LAW AND EQUITY COURT OF THE
CITY OF RICHMOND

Habeas Corpus

STUART W. NEWSOM, PETITIONER

against

W. FRANK SMYTH, JR., Superintendent of the Virginia State Penitentiary, RESPONDENT

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS—
June 3, 1959

The Court, having fully considered the petition herein, and exhibits therewith, and the argument of counsel for the petitioner, appointed with his consent by the court, and having maturely considered of its decision to be rendered thereon, finds no probable cause to believe that petitioner is detained without lawful authority. Therefore, it is ordered that the writ of habeas corpus herein prayed for be denied, to which action of the court the petitioner, by counsel, excepted.

And the services of Edward P. Simpkins, Jr., Esquire, contemplated by the order herein of the 29th day of January, 1959, having been fully and ably performed, the Court doth discharge him from any further responsibility in this matter, with sincere appreciation.

[fol. 23]

IN THE
LAW AND EQUITY COURT OF THE
CITY OF RICHMOND

STUART W. NEWSOM, PETITIONER

against

W. FRANK SMYTH, JR., Superintendent, etc.,
RESPONDENT

MEMORANDUM OPINION

In this proceeding the petitioner seeks a writ of habeas corpus, alleging in his petition that he was denied due process of law and equal protection of law in that the trial court "denied" him an appeal and failed to "aid sufficiently" a proposed appeal. The facts recited, which must be accepted as true in ascertaining whether probable cause has been shown, are to the effect that shortly after conviction petitioner made known his desire to petition the Supreme Court of Appeals of Virginia for a writ of error and requested the trial court to appoint an attorney to handle the matter, which was not done.

In the argument reference is made to Section 19-254, Code of Virginia, 1950, and to the case of *Ranieu* v. *Commonwealth*, 145 Va. 848, which deal with the postponing of the execution of sentence of persons desiring to seek a writ of error. In the petitioner's case this would have meant remaining in jail instead of being transported to the penitentiary. However, the record appended to the petition fails to disclose that a request for suspension was made.

The question presented appears to be a novel one, both under the laws of this Commonwealth and under the Federal Constitution. Without determining whether petitioner was entitled to counsel in this proceeding, this court [fol. 24] has been fortunate in having petitioner's contention most exhaustively studied and presented by an attorney of the highest qualifications.

At the time of petitioner's trial and conviction, which occurred on April 10, 1953, it was provided by statute

as follows (Acts of Assembly, 1952, Chapt. 348; now Code Sec. 19-214.1):

> "In any case in which a person is charged with a felony and is not represented by counsel, the court, before accepting the plea of such person, shall by order entered of record appoint an attorney at law to represent him."

Before 1940 we had no statutes specifically dealing with the trial court's right or duty to appoint counsel in felony cases. That year an Act was passed requiring counsel in cases where the accused desired to plead not guilty and waive jury trial. Acts of Assembly, 1940, Chapt. 218. In 1948, by the last paragraph of Section 53-278.1 of the Reorganization Provisions of the Code of Virginia, it was enacted that in any case in which any person was charged with a felony and was not represented by counsel, the court, before accepting the plea of such person, should ascertain whether he desired counsel, and if so, and such person being unable to secure counsel of his own choosing, should appoint an attorney at law to represent him. This provision was incorporated into the Code of 1950 as Section 19-214.1, and remained the law until superseded by the Act of 1952, as quoted above.

It will be observed that all of the statutes cited deal with the appointment of counsel in connection with the proceedings in the trial court only.

At the time of petitioner's conviction Section 14-180, Code of Virginia, 1950, to the effect that any "person, who, on account of his poverty is unable to pay fees or costs may be allowed by a court to sue or defend a suit therein, without paying fees or costs; whereupon he shall [fol. 25] have from any counsel whom the court may assign him, and from all officers, all needful services and process, without any fees to them therefor . . .", was in force. But this section of the Code has been held not applicable to appellate proceedings. *Tyler* v. *Garrison*, 120 Va. 697.

Section 14-181, Code of Virginia, 1950, relating to compensation of attorneys appointed to defend poor persons, is also concerned with proceedings before trial courts.

where the poor person is charged with an offense, not poor persons convicted of an offense who may desire to petition the Supreme Court of Appeals of Virginia for a writ of error.

Under Section 19-262, Code of Virginia, 1950, on affidavit and the certificate of the trial judge, petitioner could have been relieved of certain printing costs, but, again, there is nothing in this provision of the Code which gave to petitioner any statutory right to the assistance of counsel in connection with his proposed plan to seek a writ of error.

In *Barnes' Case*, 92 Va. 794, at p. 803, again referring to the proceedings in a trial court, it was said as follows:

> "If a prisoner is unable to employ counsel, the court may appoint some one to defend him, and it is a duty which counsel owes to his profession, to the court engaged in the trial, to the administration of justice, and to humanity, not to withhold his aid, nor spare his best efforts in the defence of one who has the double misfortune to be stricken with poverty and accused of crime. No one is at liberty to decline such an appointment, and few, it is to be hoped, would be disposed to do so.' Cooley's Const. Lim. 406."

In *Watkins v. Commonwealth*, 174 Va. 518, at p. 522, still again referring to proceedings in trial courts, Mr. Justice Eggleston (now Chief Justice) said as follows:

> "While there is no specific provision in the Constitution of Virginia guaranteeing to persons accused of crime the right to have the assistance of counsel,' in *Barnes v. Commonwealth*, 92 Va. 794, 803, 23 S. E. 784, this court recognized the right to be a fundamental one. It is, we think, one of the rights [fol. 26] guaranteed to an accused under our Bill of Rights. Virginia Constitution, section 8.
>
> "It is well settled that courts of record having criminal jurisdiction possess the inherent authority, independent of statute, to appoint counsel to defend paupers and other indigent persons charged with crime."

On the other hand, in this jurisdiction the inalienable rights of persons accused of crime guaranteed by Section 8 of the Virginia Constitution are one thing and appellate review quite another. The latter is not a part of due process of law, appeals and writs of error with us being discretionary. *McCue's Case*, 103 Va. 870, at p. 1008.

As is well known, in England, persons accused of felony were not allowed to have counsel appear for them in the trial courts until comparatively modern times, except, perhaps, as to some question of law, the rule being changed by statute as to high treason after the Revolution of 1688 (7 Wm. III, c. 3) and as to all felonies generally in 1836 (6 & 7 Wm. IV, c. 114). Cooley's Constitutional Limitations, 8th ed., Vol. 1, pp. 698, 700, and notes. Apparently the rule was otherwise in the case of appeals of felony, counsel being then allowed. Holdworth, History of English Law, Vol. 5, p. 192, note 2, referring to Y. B. 30, 31 Ed. I (R. S.) 530 and quoting from Y. B. 9, Ed. IV, Pasch. pl. 4.

Mr. Justice Sutherland, in *Powell* v. *Alabama*, 287 U. S. 45, at p. 60, said as follows:

> "If recognition of the right of a defendant charged with a felony to have the aid of counsel depended upon the existence of a similar right at common law as it existed in England when our Constitution was adopted, there would be great difficulty in maintaining it as necessary to due process."

And further on in the same opinion, it is pointed out that in at least twelve of the original thirteen colonies [fol. 27] laws had been passed allowing persons accused of felony the right to assistance of counsel. As for the law of Virginia, the statute of August, 1734 (Chapt. VII, Sec. III, Law of Va., 8th Geo. II, Hening's Stat. at L., Vol. 4, p. 404 is cited. On examination, the paragraph of the statute cited with which we are concerned is as follows:

> "*And it is further declared*, That in all trials for capital offenses, the prisoner, upon his petition to the court, shall be allowed counsel."

Provision for counsel was again made in Chapt. LVII, Oct. 1786, 11th Com., 12 Hening's Stat. at L., p. 343. Still later, in the Code of Virginia of 1819, C. 169, Sec. 27, the law is stated in the following language:

> "When the grand jury shall have presented to the superior court of law a bill of indictment, against any person charged with treason or felony, the court shall . . . allow him counsel to assist him at his trial, if he desire it."

In 55 A. L. R. 2d 1072, there is published a very comprehensive Annotation entitled "Right of indigent defendant in criminal case to aid of state as regards new trial or appeal." In 2 L. ed. 1644 appears an even more recent Annotation entitled "Accused's right to counsel under the Federal Constitution—Supreme Court Cases." In the latter it is said, with which I agree, as follows (2 L. ed., at p. 1649):

> "Whether an indigent defendant is, as a matter due process, entitled to the assistance of counsel for the purpose of appealing from his conviction, is a question which has not yet been squarely decided by the United States Supreme Court."

However, in both of the annotations cited appears the following statement (55 A. L. R. 2d at p. 1085; 2 L. ed., at p. 1649):

[fol. 28] > " * * *. Thus, the establishment of the rule that a state must, as a matter of federal constitutional law, provide indigents with the assistance of counsel to prosecute appeals in criminal cases would appear to be no more than a logical extension of the Griffin doctrine."

Whether this view be correct or incorrect is, of course, the question in the instant case.

In *Clesson* v. *Teets* (1957), 354 U. S. 156, 1 L. ed., 2d 1253, 77 S. Ct. 1127, it was held that due process under the Federal Constitution had been denied, where, after conviction, the petitioner, who was without counsel, was not given a reasonable opportunity to personally participate in the settlement of the record, about which there

was considerable controversy. Under California law, the petitioner could appeal as of right. In *Griffin* v. *Illinois* (1956) 351 U. S. 12, 100 L. ed. 891, 76 S. Ct. 585, 55 A. L. R. 2d 1055, it was held, as a matter of federal constitutional law, that, as to the cost of a transcript, a convicted felon is entitled to state aid, where, under the state law, persons able to pay may obtain appellate review of alleged trial errors. I find no other decisions of the Supreme Court of the United States dealing with post conviction situations in state courts.

As for the rule applicable to prosecutions in the federal courts, in *Johnson* v. *United States* (1957), 352 U. S. 565, 77 S. Ct. 550, 1 L. Ed. 2d 593, it was held, purporting to follow *Johnson* v. *Zerbst*, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461, that a Court of Appeals should appoint counsel to assist a person convicted in a District Court to obtain permission to appeal *in forma pauperis*. In the Ninth Circuit this decision has been interpreted as meaning that the Sixth Amendment to the Constitution of the United States, which is of course not applicable to state court proceedings, guarantees to persons convicted in federal district courts the right to counsel on appeal. *In re Application of Dinerstein*, 258 F. 2d 609, 611; *Anderson* v. [fol. 29] *Heinze*, 258 F. 2d 479, 481. In the Eighth Circuit the same interpretation of the *Johnson* Case seems to have been adopted. *Weber* v. *United States*, 254 F. 2d 713. In the Sixth Circuit, the year before the *Johnson Case*, an application for the appointment of an attorney on appeal was denied, it appearing that no question of law was involved. *Herrell* v. *United States*, 234 F. 2d 814. In our own Circuit, the Fourth, in the *per curiam* opinion in *Crowe* v. *United States*, 175 F. 2d 799, 801, Judges Parker, Soper and Dobie sitting, it was said as follows, this case being decided in 1949:

> "So far as appointment of counsel is concerned, the requirement of the Constitution is that the prisoner have counsel upon his trial, not when he subsequently makes a motion attacking the judgment there entered."

In *Cochran* v. *State of Kansas*, 316 U. S. 255, 62 S. Ct. 1068, 86 L. Ed. 1453, it was held that a petition for

*habeas corpus* reciting that state prison officials suppressed efforts to appeal in accordance with Kansas law stated a case for relief. In *Boukin v. Huff*, 131 F. 2d 865, where it was contended that the federal district court failed to aid in a proposed appeal, the point here presented was not decided, it being held that the application could be treated as an appeal taken in time. Denial of access to an attorney after conviction as constituting violation of the Fifth and Sixth Amendments to the Constitution of the United States was considered in *Thompson v. Johnston*, 160 F. 2d 374. These cases do not go the length of holding that a trial judge, on request, must, through the appointment of counsel and otherwise, secure to a convicted person an appeal.

In the decisions of the courts of last resort of the states there are very few cases dealing with this subject. 23 C. J. S. 326, 327. In *State v. Bonger* (Tenn.) 300 S. W. 2d 927, it was held that the accused has no constitutional right to be represented by a counsel on appeal. The contrary result, based on the peculiar wording of the [fol. 30] state constitution has been reached in Indiana, where convicted persons may appeal as a matter of right. *State v. Allen Circuit Court* (Ind), 153 N. E. 2d 914. In Wisconsin there is a statute providing for the appointment of counsel in the appellate court. *State v. Tahr*, 238 Wis. 589, 300 N. W. 754.

While I have seen in the reports of a federal Court of Appeal, to which an appeal is given as a matter of right, a suggestion to the effect that the appeal should be regarded as a "continuation of the prosecution", I do not consider this to be the correct view. Certainly, it is directly contrary to the opinion of Mr. Justice Harlan, in *Schick v. Bergareb*, 143 U. S. 442, 12 S. Ct. 525, 36 L. Ed. 218, who demonstrated, conclusively, I think, that the constitutional guarantees provided for the protection of persons accused of crime apply to "the court of original jurisdiction which pronounced the sentence, and not to the appellate court." In this connection attention is invited to Vowell v. State, 132 Tenn. 349, 178 S. W. 768, in which the cases from many jurisdictions are collected. In any event, this question is not an open one in this

jurisdiction. *McCue* v. *Commonwealth*, *supra*, which is, of course, binding on me.

I have, perhaps at undue length, referred to the old rule in England, the early statutes of this Commonwealth, and the present local law for the purpose of ascertaining whether this court should make the so-called "logical extension" of the rule in the *Griffin Case*. I do not find the "extension" logical or, indeed, permissible, without overturning doctrine centuries old, if not actually binding precedent, the latter being obviously beyond my powers. With us, as was held in Illinois, the proceedings in the appellate court are not a prosecution by the state, but a proceeding in error brought by the convicted person himself. Fielden v. People, 128 Ill. 595, 21 N. E. 584. Indeed, with us he is known as the "plaintiff in error." [fol. 31] In this branch of the law the great struggle and the great victory of the last three centuries has been in reference to a fair trial of persons charged with crime. In Lord Coke's day it was thought the care of the trial judge was a sufficient protection. 3 Inst. 137, being Chapter LXIII, entitled "Of Counsel Learned in Pleas of the Crowne". Serjeant Hawkins discussed this matter, saying, in part as follows (Hawk. P. C., 8th ed., Vol. 3, p. 554):

> "And if it be further considered that it is the duty of the court to be indifferent between the King and prisoner, and to see that the indictment be good in law, and the proceedings regular, and the evidence legal, and such as fully proves the point in issue, there seems no great reason to fear but that generally speaking, the innocent, for whose safety alone the law is concerned, have rather an advantage than a prejudice in having the court their only counsel."

Later, Sir William Blackstone, whose great work may safely be presumed to have greatly affected the early laws of this country, although to our credit the Virginia statute cited was even earlier, thought that the rule in England was wrong, thus a matter "worthy the interposition of the legislature." 4 Bla. Com., 349, 350. Now, as we have seen, no plea may be received by the trial judge in felony

cases until after the accused has had the advice of counsel.

With us an accused is entitled to one fair trial involving "no bending or breaking of his constitutional rights." Michie's Jurisprudence, Vol. 5, p. 368. Neither in the state or federal constitution is to be found any provision requiring counsel for a proposed application for a writ of error. In the case of mere errors committed by the trial court relief may be sought at the suit of the convicted person in the usual way. Detention under color of a void conviction, for which relief may be granted by habeas corpus, must involve an absence of a valid law the violation of which was charged, a lack of jurisdiction in the trial court of the crime charged or of the person [fol. 32] of the accused, or a failure of the trial court to accord to the accused those procedural safeguards guaranteed to him by the state and federal constitutions. The petition for habeas corpus in the instant case fails to allege any of these things.

[fol. 33]

IN THE
LAW AND EQUITY COURT OF THE
CITY OF RICHMOND

(Title Omitted)

NOTICE OF APPEAL

To: THE HONORABLE ROBERT LEWIS YOUNG, JUDGE OF THE AFORESAID COURT:

Comes now, Stuart W. Newsom, w' before was a petitioner in the said Court for a Writ of Habeas Corpus Ad Subjiciendum, which was in the decision of this Honorable Court, denied, pursuant to rendering an Order of Judgment voiding a sentence of life imprisonment, illegally imposed by the Hustings Court, Part II, of the City of Richmond, Virginia; does now respectfully move and hereby give NOTICE of his desire to appeal from the Order and judgment rendered in this case, to the Supreme Court of Appeals of Virginia.

It is prayed for, that by order of this Honorable Court, that appellant, may proceed in this case in Forma Puaperis, in accordance with the statuts providing for indigents suits; to-wit: Section 14-180 of the Code of Virginia.

Respectfully submitted,

/s/ Stewart W. Newsom
STUART W. NEWSOM,
Appellant

This is to certify that I mailed a copy of the foregoing NOTICE of Appeal to Albertis S. Harrison, Attorney General of Virginia, this 15 day of June, 1959.

/s/ Stewart W. Newsom
STUART W. NEWSOM,
Appellant

[fol. 34] IN THE
LAW AND EQUITY COURT OF THE
CITY OF RICHMOND

(Title Omitted)

ASSIGNMENT OF ERROR—Filed June 29, 1959

To: THE HONORABLE ROBERT LEWIS YOUNG, JUDGE OF THE AFORESAID COURT:

Now comes Appellant, Stuart W. Newsom, who was before your petitioner, who respectfully presented by mail, addressed to the Honorable Judge of said Court, his petition for the Writ of Habeas Corpus Ad Subjiciendu, on or about the 9th day of January A. D. 1959.

WHEREUPON, and during which time the Honorable Judge of the aforesaid, Law And Equity Court, considered, determined and returned his decision by order of judgment dated and entered on the 3rd day of June A. D. 1959, which order of judgment executed, confirmed the validity of the original illegal sentence of the Husting Court Part II, of the City of Richmond, dated 10th day of April A. D. 1953.

Your Appellant respectfully contends that this Honorable Court erred in his analogy.

Petitioner, which is now your Appellant, contended, to: wit, that he was denied Due Process of Law, and Equal Protection, when the Husting Court Part II, of the City of Richmond, denied him an appeal from its judgment, rendered and executed on the 10th day of April A. D. 1953, and in that, failing to aid sufficiently the intended appeals of the appellant—supported by certified copies, namely Exhibit "C and B", in which res ipsa loquitur.

[fol. 35] 1. The Court decision and judgment are against the law in this case.

2. The decision is contrary to the evidence, presented.

3. The Court admitted the question which was presented, appears to be a novel one, both under the Laws of this Commonwealth and under the Federal Constitution.

4. The court erred in failing to follow the rule of "stare decesis".

Appellant wishes, and with affableness, to make it plain to this Honorable Court, that he realize that he has confronted and presented to a high and outstanding Court, a very extraordinary question, and he feels that the Honorable Court, executed his decision in bona fide.

* * * * *

In this Honorable Court opinion page 1., presented Sec., 19-254 and therein the case of Ramey v. Commonwealth, 145 Va. 848, which deal with postponing of the execution of sentence of a person desiring to seek a Writ of Error * * * and to compute, this Honorable Court states, "However, the record appended to the petition fails to disclose that a request for suspension was made". This seem to be the basicty comply.

An appeals means a trial de novo (anew) in a higher court, in its broad sense, the word "appeal" means any proceeding in error by which the alleged errors committed in a TRIAL COURT are reviewed in an appellate court, and therefore, there is no second trial, therefore, the trial court had not lost its jurisdiction, if so, it would be immaterial to the trial Court whether or not, if the defendant gave NOTICE OF APPEAL, and therewith assignment of errors, or not. Therefore the case still remain in the breast of the trial court. And in this sense, the defendant is still in the jurisdiction of the Trial Court, and he is therefore entitled to an Attorney, and if in poverty, upon request, the Court is to appoint an Attorney to aid, or [fol. 36] perfect that which is therefore, provided by the legislative of this Commonwealth, which ascertained under Section 14-180, Code of Virginia, 1950, and Section 19-214.1, which remain as or now, and mandatory.

This Honorable Court, submitted in his opinion Section 19-254 Code of Virginia, 1950, and to the case of Ramey v. Commonwealth 145 Va. 848; quote in part—: "If a person sentenced by a person sentenced by a circuit or corporation court to death or confinement in the penitentiary asks for time to apply for a writ of error, the court shall postpone the execution of its sentence for such time deem proper."

This said Section doesn't state How A PERSON should ask for time to apply for a writ of error; it merely states, Ask. This could mean a number of ways, by phone, letter or telegram or what not. It doesn't say ask in or out of court, or to any member of the court.

The Order of conviction re ipsa loquitur, beyond any reasonable of doubts. Appellant made it clear that his attorney, did not represent him properly, which therefore, again show, that his spirt to the accused was that of lackadasically, which point out, why should he ask for an appeal, or made ground for an appeal, when all along he had no spirit, to stand or to maintain toward the Court a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. The said order of conviction also point out that the defendant executed what little knowledge he had to show the court that he desired an appeal, and that a great negligence of duty had been conceived.

Your appellant contends that your Honor's decision, necessitating this appeal, it is further depriving this prisoner of due process of law, as well as depriving him [fol. 37] of Equal Protection, as well as depriving him of his liberty unlawfully. Your appellant contends that it is both unlawfully and unconstitutional according to the law of the land, whereas, the due process clause requires "that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. Herbert v. Louisiana, 272 U.S. 312. 316, 47 S.Ct. 103, 104, 71 L.Ed. 270, 48 A.L.R. 1102.

A denial of Equal Protection of the laws is prohibited by the Fourteent Amendment to the Federal Constitution; a guaranty that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons . . . Ballentine 2d ed.

WHEREFORE, your appellant prays that this Honorable Court to cause record in this case together with this

Court's permission to Appeal, the aforesaid, to the Supreme Court of Appeals of Virginia

In duty bound I will forever pray, etc. . . .

Respectfully submitted

/s/ Stewart W. Newsom
STUART W. NEWSOM,
Appellant

[fol. 38] • • •
[fol. 39] • • •
[fol. 40] IN THE
SUPREME COURT OF APPEALS

ORDER REFUSING PETITION FOR WRIT OF ERROR—
Oct. 13, 1959

The petition of Stuart W. Newsom for a writ of error to a judgment rendered by the Law and Equity Court of the City of Richmond on the 3rd day of June, 1959, in a certain proceeding then therein depending, wherein the said petitioner was plaintiff and W. Frank Smyth, Jr., Superintendent of the Virginia State Penitentiary, was defendant, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition, and refuse said writ of error, the effect of which is to affirm the judgment of the said Law and Equity Court.

Mr. Justice Miller took no part in the consideration or decision in this case.

• • • •

[fol. 41] • • •

• • • •

[fol. 42] Clerk's Certificate to foregoing Transcript
Omitted in Printing.

[fol. 43] SUPREME COURT OF THE UNITED STATES

(Title Omitted)

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—May 31, 1960.

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of Appeals of the Commonwealth of Virginia.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 974.

May 31, 1960

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FILE COPY

PETITION NOT PRINTED

Office-Supreme Court, U.S.
FILED
NOV 4 1960
JAMES F. DAVEY, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

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# No. 116

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STEWART W. NEWSOM,

*Petitioner,*

*vs.*

W. FRANK SMYTH, JR.,

Superintendent of Virginia State Penitentiary.

---

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

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## BRIEF FOR PETITIONER

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*711 Princess Street*
*Alexandria, Virginia*
*Counsel for Petitioner*

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# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1960**

## No. 116

STEWART W. NEWSOM,

*Petitioner,*

*vs.*

W. FRANK SMYTH, JR.,

Superintendent of Virginia State Penitentiary.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

## BRIEF FOR PETITIONER

### Opinions Below

No opinion was written by the Supreme Court of Appeals of Virginia. The order entered by that Court appears at R. 36. The judgment order entered by the Law and Equity Court of the City of Richmond appears at R. 22, and the memorandum opinion of that Court appears at R. 23-31.

### Jurisdiction

Jurisdiction of this Court is invoked under the provisions of U.S.C. Title 28, §1257(3), the Petitioner claiming violation of a right guaranteed by the Due Process and Equal

Protection of the Law clauses of the Fourteenth Amendment of the United States Constitution.

The constitutional question was raised in the Petition for Writ of Habeas Corpus, in the brief in support thereof and in the exhibits attached thereto, all filed by the Petitioner in the Law and Equity Court of the City of Richmond, Virginia, on January 12, 1959 (R. 4, 6, 13, 14). The Judge of that Court, in his opinion and order entered June 3, 1959, expressly considered, ruled upon and denied the claim of the Petitioner (R. 22-31). The Supreme Court of Appeals of Virginia by final order entered October 13, 1959, did affirm the judgment of the lower court (R. 36). Petition for certiorari filed in this Court on November 3, 1959, together with motion for leave to proceed *in forma pauperis*, was granted by order entered May 31, 1960.

## Constitutional Provisions and Statutes Involved

Strictly speaking the only constitutional or statutory provision indispensably involved in this case is §1 of the Fourteenth Amendment to the Constitution of the United States.

However, as it may be helpful in reminding the Court of the Federal and State constitutional and statutory background of the question now under consideration, several constitutional provisions and statutes are set out verbatim, *infra*, in Appendix A. They are cited here as follows:

1. Amendment V to the Constitution of the United States.
2. Amendment VI to the Constitution of the United States.
3. Amendment XIV, §1 to the Constitution of the United States.

4. Title 28 U.S.C. §1257(3).

5. Title 28 U.S.C. §2241(c)(3).

6. Section VIII, first paragraph of the Constitution of Virginia.

7. Section 8-463 of the Code of Virginia of 1950.

8. Section 14-181 of the Code of Virginia of 1950.

9. Section 19-167 of the Code of Virginia of 1950, as in effect in April 1953.

10. Section 19-214.1 of the Code of Virginia of 1950, as in effect in April 1953 (Acts of Assembly 1952, Ch. 348).

11. Section 19-262 of the Code of Virginia of 1950.

## Question Presented for Review

Is an indigent, convicted in a State Court of a capital offense and sentenced to life imprisonment, entitled to counsel, upon request, for the purpose of appealing from his conviction?

## Statement of the Case

On April 10, 1953, Petitioner was tried for murder in the first degree in the Hustings Court of the City of Richmond, Part II, Richmond, Virginia. He was convicted by a jury and his punishment was fixed at life imprisonment in the State Penitentiary (R. 11, 12). During the trial and after the trial through the time when exception was taken to the Court's ruling denying a motion to set aside the verdict, the Petitioner was represented by counsel of his own choosing. Immediately thereafter the services of trial counsel ceased. From then on Petitioner represented himself. He requested the Court for an opportunity to produce

within ten days additional evidence which his attorney had failed to introduce. This request was denied and the Petitioner was ordered confined to the Penitentiary for and during his natural life (R. 12).

Eight days later, on April 18, 1953, Petitioner wrote to the Trial Judge "noting an appeal", and stating that he would attempt to get counsel "to complete the appeal" (R. 13). Five days thereafter, on April 23, 1953, he wrote a second letter to the Trial Judge stating that he had been unable to engage an attorney to "complete" his appeal, and requesting that the Court appoint counsel to appeal his case to the highest Court of Virginia (R. 14). The Court failed to grant the request and did not appoint counsel for the Petitioner to carry out the appeal.

The Petitioner's "noting" of appeal and request for counsel on appeal came well within the four months period allowed for taking an appeal under the applicable statutes of the State and rules of the Supreme Court of Virginia. §8-463 of the Code of Virginia of 1950; Rule 5:4 of Rules of the Supreme Court of Appeals of Virginia. Moreover, although the Petitioner did not precisely say so in his letter of April 23, 1953, the Judge of the Law and Equity Court of the City of Richmond, Virginia, who first heard the Petition for Writ of Habeas Corpus in this case now before the Court recognized that the Petitioner was in fact indigent on April 23, 1953 (R. 18, 24, 25, 27).

On January 12, 1959, Petitioner filed his Petition for Writ of Habeas Corpus in the Law and Equity Court of the City of Richmond, Virginia, together with Affidavit of Poverty and Brief in Support of the Petition (R. 1-10). Honorable Robert Lewis Young, Judge of the Law and Equity Court, appointed counsel to argue the Petition (R. 20, 21), notified the Petitioner (R. 18) and after studious consideration rendered a memorandum opinion (R. 23-31)

and entered an order on June 3, 1959, denying the Petition (R. 22). In his opinion and order Judge Young passed directly upon the question here presented for review (R. 27). As stated above, Petition for Certiorari was granted by this Court on May 31, 1960, from final order entered October 13, 1959, by the Supreme Court of Appeals of Virginia affirming the judgment of Law and Equity Court of the City of Richmond (R. 36, 37).

In Virginia, the right of appeal is not absolute but is discretionary with the Court. §8-476 of the Code of Virginia of 1950. The rules governing appellate procedure include criminal as well as civil appeals. Rules of Supreme Court of Appeals of Virginia, Rule 5:1 §1. *Skeens* v. *Commonwealth* (1951), 192 Va. 200, 64 S.E. 2d 764.

Petitioner here has exhausted the remedies available in the Courts of Virginia pursuant to the requirements of Title 28 U.S.C. §2254.

## ARGUMENT

The sole question involved in this case is simple. The arguments are succinct. The appointment of appellate counsel should be made in this case because:

1. Justice demands it.
2. The Fourteenth Amendment requires it.
3. The decisions of this Court support it.

1. It is elemental that a layman cannot "competently defend himself" [1] in the trial of a criminal case. His incompetency is just as obvious in the morass of appellate intricacies and technicalities.

[1] From the admission of the Assistant Attorney General of Texas quoted in *Parker* v. *Ellis* (1960), 362 U.S. 574, 578, 4 L.ed. 2d 963, 967, 80 S.Ct. 909, 912, in Footnote 3.

The necessity for the help of counsel in perfecting and prosecuting an appeal exists in all states of the United States in general, and in Virginia in particular. There are thirty-four technical sections in Title 8, Chapter 21 of the Virginia Code dealing with the subject of appeal. Sections 8-462 through 8-502. Fifteen pages, comprising approximately one-third of all, of the Rules of the Supreme Court of Appeals of Virginia are devoted to appellate proceedings. Rules of Supreme Court of Appeals of Virginia, Rule 5:1 through Rule 5:14. Like most statutes and rules, no matter how beneficial and how carefully drawn, these laws and rules have been interpreted by Court decisions practically countless in number. The Petitioner in this case, when he asked for counsel, was faced with this quagmire of statutes, rules and decisions.

Moreover, if the Petitioner had been assigned counsel when he made the request, his chances for successful review would have been good, for out of the 167 criminal cases in which appeals have been allowed by the Supreme Court of Appeals of Virginia since January 1, 1950, 96 of these cases have been reversed and 71 have been affirmed. The odds definitely favor criminal appeals competently handled. The Petitioner should have been permitted to take advantage of those odds.

2. Under the Fourteenth Amendment to the Constitution of the United States a State cannot abridge the privileges or immunities of citizens, cannot deprive any person of life, liberty or property without due process of law, and cannot deny to any person the equal protection of its laws. Perhaps as society develops in the years ahead, it will demand and obtain a broader interpretation of the privileges or immunities clause than the past has required. For the Petitioner's purposes, the due process and equal protection clauses shield him more than adequately.

The phrase "due process of law" has been known to the science of jurisprudence for many centuries. The words in the phrase are dead and have remained the same. Their meaning has grown and flowered according to the needs of the vital society in which they have thrived. In medieval days they may have referred to trial by ordeal. In the early years of modern history they assured the interest if not the protection of a trial judge. Today they guarantee the right of an accused to counsel. *Watkins* v. *Commonwealth* (1940), 174 Va. 518, 6 S.E. 2d 670.[2]

The right to trial counsel having been established through the due process clause, the right to appellate counsel is required to be recognized under the equal protection clause of the Fourteenth Amendment. It is true that states are not compelled to establish appellate procedures in their Courts. *Commonwealth* v. *McCue* (1905), 103 Va. 870, 49 S.E. 623. But once they are established they must be offered alike to all persons. There must be equal justice under law. Legal remedies must be made available without distinction between rich and poor.[3]

3. As long as twelve years ago a minority of this Court felt that in all criminal trials, State as well as Federal, where serious offenses were charged, the failure to offer counsel deprived the accused of rights under the Fourteenth Amendment. And the entire Court was of the opinion

[2] It is especially significant that the Virginia Supreme Court of Appeals in this decision held that the fundamental right to counsel in a criminal trial was guaranteed by the rather nebulous phrase in Section 8 of the Virginia Constitution that a man "shall not be deprived of life or liberty, except by the law of the land."

[3] There are several Virginia statutes providing for the appointment of counsel and the payment of counsel for poor persons in criminal trials in the Commonwealth; §14-181, 19-167 and 19-214.1 of the Code of Virginia of 1950; and one statute providing for the remission of the costs of printing the record in felony appeals; §19-262 of the Code of Virginia of 1950. See Appendix, *infra*.

that in capital cases, State and Federal, where proceedings without counsel were so apt to result in injustice as to be fundamentally unfair, the accused must have legal assistance whether he requested counsel or not. *Uveges* v. *Pennsylvania* (1948), 335 U.S. 437, 93 L.ed. 127, 69 S.Ct. 184.

Where a person convicted in a State Court has not waived the benefit of counsel and where circumstances show that his rights could not have been fairly protected without trial counsel, the Due Process clauses in the Fifth and Fourteenth Amendments to the Federal Constitution invalidate his conviction. *Pennsylvania* v. *Claudy* (1956), 350 U.S. 116, 100 L.ed. 126, 76 S.Ct. 223.

This decision has been reaffirmed in *Moore* v. *Michigan* (1957), 355 U.S. 155, 2 L.ed. 2d 167, 78 S.Ct. 191; *Cash* v. *Culver* (1959), 358 U.S. 633, 3 L.ed. 2d 557, 79 S.Ct. 432; *Sublett* v. *Adams* (1960), 362 U.S. 143, 4 L.ed. 2d 612, 80 S.Ct. 527, and *Wilde* v. *Wyoming* (1960), 362 U. S. 607, 4 L.ed. 2d 985, 80 S.Ct. 900.

It is true that in the above mentioned cases the rule of right to counsel is established for defendants in trial courts. However, this Court has made the further definite indication that the right to counsel should not terminate at the end of a trial but must continue through the intricacies of appeal. Certainly in the Federal Courts indigent convicts are entitled to the appointment of counsel on appeal. *Johnson* v. *United States* (1957), 352 U.S. 565, 1 L.ed. 2d 593, 77 S.Ct. 550. In that case the Court emphasized that an appellate court was obligated to assign counsel to the petitioner for prosecuting his application for leave to appeal *in forma pauperis*. *Ellis* v. *United States* (1958), 356 U.S. 674, 2 L.ed. 2d 1060, 78 S.Ct. 974 (right to counsel on application for leave to appeal *in forma pauperis*).

In regard to state criminal trials, a most significant advance was made in *Griffin* v. *Illinois* (1956), 351 U.S. 12, 100 L.ed. 891, 76 S.Ct. 585. In that case the indigent petitioners sought a certiorari because of the failure of a State Court to furnish them without cost a certified copy of the record including a transcript of the trial proceedings. The record was a condition precedent to appellate review in Illinois, where indigent defendants sentenced to death were provided free records, but all other criminal defendants were required to buy them. In vacating the judgment of the Supreme Court of Illinois and remanding the cause to that Court for further action, the majority of this Court determined that the due process and equal protection clauses of the Fourteenth Amendment prevented Illinois from granting appellate review to those able to pay for it and from denying appellate review to those unable to pay the cost. The majority of the Court rested their decision upon this relevant, just and forceful language:

> "There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance. It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all.
>
> "... But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations. See Cole v.

Arkansas, 333 U.S. 196, 201, 92 L.ed. 644, 647, 68 S.Ct. 514; Dowd v. United States, 340 U.S. 206, 208, 95 L.ed. 215, 218, 71 S.Ct. 262, 19 A.L.R. 2d 784; Cochran v. Kansas, 316 U.S. 255, 257, 86 L.ed. 1453, 1454, 62 S.Ct. 1068; Frank v. Mangum, 237 U.S. 309, 327, 59 L.ed. 969, 980, 35 S.Ct. 582." (351 U.S. 18, 100 L.ed. 898, 899.)

In *Eskridge* v. *Washington State Board* (1958), 357 U.S. 214, 2 L.ed. 2d 1269, 78 S.Ct. 1061, this Court determined that *Griffin* v. *Illinois, supra*, was controlling. Consequently the Court held that the State of Washington had deprived the petitioner of a constitutional right guaranteed by the Fourteenth Amendment by denying him appellate review of his conviction merely because he could not afford to pay for the record of his trial.

The case of *Burns* v. *Ohio* (1959), 360 U.S. 252, 3 L.ed. 2d 1209, 79 S.Ct. 1164, involved a factual situation where an indigent defendant convicted of burglary and sentenced to life imprisonment was advised by the Clerk of the Supreme Court of Ohio that he must pay a filing fee before he could file a motion for leave to appeal in an Ohio Court. In vacating the judgment below and remanding the case to the Supreme Court of Ohio for further action the opinion of this Court clarified and reaffirmed the decision in *Griffin* v. *Illinois, supra*, in this language:

"Since Griffin proceeded upon the assumption that review in the Illinois Supreme Court was a matter of right, 351 U.S., at 13, Ohio seeks to distinguish Griffin on the further ground that leave to appeal to the Supreme Court of Ohio is a matter of discretion. But this argument misses the crucial significance of Griffin. In Ohio, a defendant who is not indigent may have the Supreme Court consider on the merits of his application for leave to appeal from a felony conviction. But as that Court has interpreted §1512 and its rules

of practice, an indigent defendant is denied that opportunity. There is no rational basis for assuming that indigents' motions for leave to appeal will be less meritorious than those of other defendants. Indigents must, therefore, have the same opportunities to invoke the discretion of the Supreme Court of Ohio.

"The State's action in this case in some ways is more final and disastrous from the defendant's point of view than was the Griffin situation. At least in Griffin, the defendant might have raised in the Supreme Court any claims that he had that were apparent on the bare record, though trial errors could not be raised. Here, the action of the State has completely barred the petitioner from obtaining any review at all in the Supreme Court of Ohio. The imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law.

"What was said in Griffin, might well be said here: 'We are confident that the State will provide corrective rules to meet the problem which this case lays bare.' 351 U.S., at 20." (360 U.S. 257, 258, 3 L.ed. 2d 1213.)

A most recent reaffirmation of the *Griffin* case was the decision in *Douglas* v. *Green* (1960), 363 U.S. 192, 4 L.ed. 2d 1142, 80 S.Ct. 1048. In this case the Court held, in a *per curiam* opinion, that the indigent petitioner was deprived of his constitutional rights to the equal protection of the laws when the payment of docket fees was made a condition precedent to appellate remedy.

The decision in *Chessman* v. *Teets* (1957), 354 U.S. 156, 1 L.ed. 2d 1253, 77 S.Ct. 1127, extended, or perhaps more accurately elucidated, the *Griffin* doctrine. There this Court held that an *ex parte* settlement of a State Court record,

after trial, violated the petitioner's constitutional rights to procedural due process, stating:

> "We think the petitioner was entitled to be represented throughout those proceedings either in person or by counsel. . . . If California chose to deny petitioner's request to appear in those proceedings in propria persona, it then became incumbent on the State to appoint counsel for him." (354 U.S. 162, 1 L.ed. 2d 1258.)

Thus *Chessman* v. *Teets* recognized that the constitutional right to counsel continued after trial and into the appellate process. Just as the line of constitutional right to counsel should not be drawn between trial and appeal it cannot be drawn at any point between the commencement of appeal and the conclusion thereof. The meaningfulness of the *Griffin* decision, recognized in the *Chessman* case, is further acknowledged and stated by the Annotator in 55 A.L.R. 2d 1085, as follows:

> "The general rule established in Griffin v. Illinois . . . that an indigent convicted of crime is, as a matter of federal constitutional law, entitled to state aid in obtaining appellate review of trial errors where review of such errors is available to persons able to pay the attendant expenses, does not reach the question whether such an indigent is entitled to be furnished with counsel to prosecute his appeal. A clear solution to this question must await further development of the Griffin rule. But this comment may be made: the essence of the Supreme Court's ruling in the Griffin Case is that a person convicted of crime cannot be put at a substantial disadvantage with respect to appellate review of his conviction merely because he is poor. Surely a substantial disadvantage exists where an appellant, because lacking the money with which to employ counsel, is forced to appear pro se

> before the appellate court. Thus, the establishment of the rule that a state must, as a matter of federal constitutional law, provide indigents with the assistance of counsel to prosecute appeals in criminal cases would appear to be no more than a logical extension of the Griffin doctrine."

Indeed it is arguable that an indigent convict's right to appellate counsel is *within* rather than *beyond* the scope of the *Griffin* rule. The furnishing of a free record for appeal places a financial burden on the State. The furnishing of counsel for appeal does not involve this economic cost. Certainly it would be an empty gesture to give a litigant a vehicle in which to travel the tortuous road of appellate review but to withhold from him an operator able to drive the vehicle. An appellant without counsel is as helpless as one without a record.

The constitutional propriety of counsel for indigent appellants has been recognized by lower Federal courts. *Holmes* v. *United States* (C.A. 8th Cir. 1942), 126 F. 2d 431; *United States* v. *Scoilla* (C.A. 2nd Cir. 1949), 174 F. 2d 879; *United States* v. *Ragen* (D.C.N.D. Ill. 1945), 60 F. Supp. 820. State courts have also recognized that the refusal to assign counsel to indigent appellants may violate the constitutional guarantees of due process and equal protection. *Hendrix* v. *Rhay* (1960), 156 Wash. 435, 353 P. 2d 878, where the Court states:

> "It is not enough that we provide counsel at public expense at the trial level; the fundamental principle that every person accused of a crime shall have a fair and impartial trial requires that an indigent defendant also be represented by an attorney at the appellate level. If he is denied the services of an attorney at the post-conviction proceedings and the appellate stage, the constitutional right to appellate review is illusory" (p. 880).

See also *State ex rel. Grecco v. The Allen Circuit Court* (1958), 238 Ind. 571, 153 N.E. 2d 914 (accused entitled to counsel at every stage of proceedings under Indiana Constitution); *People v. Kalan* (1957), 2 N.Y. 2d 278, 140 N.E. 2d 357 (refusal to assign counsel upon request prevented effective use of the right to appeal in violation of the constitutional guarantees of due process and equal protection); *Willey v. Hudspeth* (1957), 162 Kan. 516, 178 P. 2d 246 (State criminal defendant protected by Fourteenth Amendment to Federal Constitution).

The essential and extraordinary nature of the indigent criminal's right to counsel, as recognized in Federal and State courts, is emphasized in three decisions of this Court holding that a petitioner is not barred from presenting a challenge to his conviction by the passage of seven, eight or even eighteen years. *Uveges v. Pennsylvania* (1948), 335 U.S. 437, 93 L.ed. 127, 69 S.Ct. 184; *Pennsylvania v. Claudy* (1956), 350 U.S. 116, 100 L.ed. 126, 76 S.Ct. 223; and *Palmer v. Ashe* (1951), 342 U.S. 134, 96 L.ed. 154, 72 S.Ct. 191.

## Conclusion

For the foregoing reasons the judgment of the Supreme Court of Appeals of Virginia should be reversed and the case remanded to that Court with the suggestion that that Court or the Hustings Court of the City of Richmond, Part II, Richmond, Virginia, appoint counsel for the Petitioner to appeal his conviction and sentence of April 10, 1953, to the Supreme Court of Appeals of the Commonwealth.

Respectfully submitted,

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# APPENDIX A

## Constitutional Provisions and Statutes:

### Federal

1. Amendment V to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Amendment VI to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

3. Amendment XIV to the Constitution of the United States:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of

the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. Title 28 U.S.C., § 1257 (3):

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * * * *

By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

5. Title 28 U.S.C., § 2241 (c) (3):

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. . . .

* * * * *

The writ of habeas corpus shall not extend to a prisoner unless—

* * * * *

He is in custody in violation of the Constitution or laws or treaties of the United States;

STATE

6. § 8, first paragraph, of the Constitution of Virginia:

That in criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty. He shall not be deprived of life or liberty, except by the law of the land or the judgment of his peers; nor be compelled in any criminal proceeding to give evidence against himself, nor be put twice in jeopardy for the same offense.

7. § 8-463 of the Code of Virginia of 1950:

No petition shall be presented for an appeal from, or writ of error or supersedeas to, any final judgment, decree, or order, whether the Commonwealth be a party or not, (a) which shall have been rendered more than four months before the petition is presented, or (b), if it be an appeal from a final order, judgment or finding of the State Corporation Commission which shall have been rendered more than four months before the petition is presented, or (c), if it be an appeal from a final award of the Industrial Commission unless the petition be presented within the time provided by § 65-94, or (d), if it be an appeal from a final decree refusing a bill of review to a decree rendered more than four months prior thereto, unless the petition be presented within three months from the date of such decree.

8. § 14-181 of the Code of Virginia of 1950:

When a judge of the circuit court of a county or city or a corporation or hustings court of a city ap-

points an attorney to defend a poor person charged with an offense that may be punishable by death, or by confinement in the penitentiary for a period of more than ten years, he may direct that a sum of money not to exceed forty dollars shall be paid out by the Commonwealth to the attorney so appointed to defend such person as compensation for such defense, and when such person is charged with the commission of a felony other than those mentioned the court may in its discretion direct the payment of a sum not to exceed fifteen dollars payable as aforesaid. When such direction is entered upon the order book of the court, the Commonwealth shall provide for the payment out of its treasury of the sum of money so specified. If the defendant is convicted, the amount allowed by the court to the attorney appointed to defend him shall be taxed against the defendant as a part of the costs of the prosecution, and if collected, the same shall be paid to the Commonwealth.

9. § 19-167 of the Code of Virginia of 1950 as in effect in April, 1953:

One accused of a felony may plead not guilty and, with his consent after being advised by counsel (who shall be appointed for him by the court, in all cases when he has no counsel of his own choosing) and the concurrence of the attorney for the Commonwealth and of the court entered of record, he may waive a jury; in case of such waiver, or a plea of guilty, the court shall try the case.

10. § 19-214.1 of the Code of Virginia of 1950 as in effect in April, 1953 (Acts of Assembly 1952, Ch. 348):

In any case in which a person is charged with a felony and is not represented by counsel, the court,

before accepting the plea of such person, shall by order entered of record appoint an attorney at law to represent him.

11. § 19-262 of the Code of Virginia of 1950.

Sections 8-481, 8-482, 8-497.1, 8-499, 8-500 and 14-129 shall apply as well to criminal cases as to civil cases; provided, that in a felony case in the Supreme Court of Appeals, if the plaintiff in error file with the clerk of the Court an affidavit that he is unable to pay or secure to be paid the costs of printing the record in the case, together with a certificate of the judge of the trial court to the effect that he has investigated the matter and is of opinion that the plaintiff in error is unable to pay, or secure to be paid, such costs, the printing shall be done as if the costs had been paid and the clerk shall not be required to account for and pay the same into the State treasury; but if the costs be not paid or secured to be paid and upon the hearing of the case the judgment of the court below be wholly affirmed by the Supreme Court of Appeals the Court in affirming shall also give judgment in behalf of the Commonwealth against the plaintiff in error for the amount of the costs to be taxed by its clerk.

COPY

PETITION NOT PRINTED

In the

# Supreme Court of the United States

October Term, 1960

No. 116

STUART W. NEWSOM,
*Petitioner*

v.

W. FRANK SMYTH, JR., SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,
*Respondent*

## BRIEF AND APPENDIX ON BEHALF OF RESPONDENT

A. S. HARRISON, JR.
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*Assistant Attorney General*

Supreme Court–State Library Building
Richmond 19, Virginia

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v.

W. FRANK SMYTH, JR., SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,

*Respondent*

## BRIEF ON BEHALF OF RESPONDENT

### OPINION BELOW

The Supreme Court of Appeals of Virginia did not write an opinion in the case at bar, but entered an order dismissing the petition for a writ of error (R. 36) and affirming the judgment of the Law and Equity Court of the City of Richmond (R. 22). The memorandum opinion of the Law and Equity Court is found in the printed record, commencing on page 23.

### JURISDICTION

The petitioner purports to have invoked the jurisdiction of this Court under the provisions of U. S. C., Title 28, Section 1257(3). The petitioner has alleged that a right guaranteed to him by the due process and equal protection

of the law clauses of the Fourteenth Amendment to the Constitution of the United States has been denied him. This Court granted the petitioner's motion to proceed in *forma pauperis* and granted certiorari on May 31, 1960.

## PRELIMINARY STATEMENT

Essential to the understanding of the issue presented in this appeal is a history of the proceedings in which the petitioner has heretofore been involved. In order to explain concisely the lengthy history of the petitioner's efforts in his own behalf, the proceedings which have occurred prior to the day on which this brief is written will be chronologically set forth below:

1. April 10, 1953. Petitioner was convicted of first degree murder and sentenced to life imprisonment, pursuant to the verdict of the jury, by the Judge of the Hustings Court of the City of Richmond, Part II. Petitioner was represented by counsel of his own choosing (R. 11).

2. April 18, 1953. Petitioner wrote to the Trial Judge noting an appeal from his conviction (R. 13).

3. April 23, 1953. Petitioner wrote to the Trial Judge and requested him to appoint an attorney to appeal petitioner's conviction to the Supreme Court of Appeals of Virginia (R. 14).

4. March 23, 1956. Petitioner filed a petition for a writ of habeas corpus in the Hustings Court of the City of Richmond, Part II, and counsel was appointed to represent him. He alleged that he had been tried by a jury of eleven persons.

5. November 1, 1956. A *nunc pro tunc* proceeding was filed by the Commonwealth to correct the typographical error in the record in the case of *Commonwealth of Virginia* v.

*Stuart Newsom*; a Rule to Show Cause was entered and an attorney was appointed to represent Newsom.

6. November 12, 1956. A hearing was held in the *nunc pro tunc* proceeding. Evidence was taken and an order was entered correcting the judgment order of conviction to show that the jury was composed of twelve persons. An attorney was appointed to assist Newsom in perfecting an appeal, which appeal was later abandoned at Newsom's direction. Newsom is now detained under this order.

7. March 1, 1957. After a full hearing, at which the petitioner testified and was represented by counsel, the petition for a writ of habeas corpus was dismissed by the judge designate of the Hustings Court of the City of Richmond, Part II.

8. October 16, 1957. The Supreme Court of Appeals of Virginia denied a petition for a writ of error to the judgment of the Hustings Court of the City of Richmond, Part II, of March 1, 1957.

9. March 3, 1958. The Supreme Court of the United States denied certiorari to the judgment of the Supreme Court of Appeals of Virginia of October 16, 1957, 355 U. S. 904, 2 L. Ed. 2d 538, 78 S. Ct. 553.

10. April 11, 1958. The Judge of the United States District Court for the Eastern District of Virginia denied Newsom's petition for a writ of habeas corpus (Appendix I) for the reasons stated in a memorandum opinion (Appendix II).

11. December 5, 1958. The United States Court of Appeals for the Fourth Circuit dismissed petitioner's appeal with a written opinion, 261 F. 2d 452 (Appendix III).

12. April 20, 1959. The Supreme Court of the United States denied certiorari to the judgment of the United States Court of Appeals for the Fourth Circuit of December 5, 1958, 359 U. S. 969, 3 L. Ed. 2d 837, 79 S. Ct. 833.

13. June 3, 1959. The Law and Equity Court of the City of Richmond denied Newsom's petition for a writ of habeas corpus (R. 22).

14. October 13, 1959. The Supreme Court of Appeals of Virginia denied Newsom's petition for a writ of error to the judgment of the Law and Equity Court of the City of Richmond of June 3, 1959 (R. 36).

15. April 28, 1960. Newsom's petition for a writ of *coram vobis* was denied by the Hustings Court for the City of Richmond, Part II (Appendix V).

16. May 31, 1960. Certiorari granted by the Supreme Court of the United States.

17. October 10, 1960. The Supreme Court of Appeals of Virginia denied Newsom's petition for a writ of error to a judgment of the Hustings Court of the City of Richmond, Part II, of April 28, 1960, wherein Newsom's petition for a writ of *coram vobis* was denied (Appendix VI).

The above mentioned proceedings will be hereinafter discussed and their relationship to the issue presented in the case at bar will be explained.

## STATEMENT OF THE CASE

In January of 1959 Stuart Newsom filed a petition for a writ of habeas corpus in the Law and Equity Court of the City of Richmond. On January 29, 1959, the Honorable Robert Lewis Young, one of the judges of that Court, ad-

vised Newsom that the Court had appointed Edward B. Simpkins, Jr., Attorney at Law, to represent him in his habeas corpus proceeding (R. 18) and, on the same day, the Court entered an order making such appointment. An Assistant Attorney General of Virginia had previously advised the Court that the petitioner had not complied with the provisions of Section 8-596 of the Code, in that he had failed to enumerate the disposition of his previous habeas corpus petitions (R. 15). The petitioner then advised the Court that he had not heretofore raised the issue which he presented in the instant petition. The petitioner contending that he had been "denied due process of law and equal protection when the Husting Court, Part II, of the City of Richmond denied him an appeal from its judgment render on the 10th day of April, 1953, and in that, failing to aid sufficiently the intended appeals of the Appellant." (R. 5). On June 3, 1959, Judge Young entered an order dismissing the petition for a writ of habeas corpus for the reason that he found "no probable cause to believe that the petitioner is detained without lawful authority." (R. 22). On October 13, 1959, the Supreme Court of Appeals of Virginia denied Newsom's petition for a writ of error. This Court granted certiorari on May 31, 1960.

**QUESTION PRESENTED**

Is a person who is represented by counsel of his own choosing in a state court and who is convicted of a capital offense and sentenced to life imprisonment entitled to have the Court appoint counsel, upon request, to represent him for the purpose of appealing his conviction in the absence of any allegation that he is a pauper or that his own counsel has withdrawn from the case?

## ARGUMENT

**A Person Who Is Represented by Counsel of His Own Choosing in a State Court and Who Is Convicted of a Capital Offense and Sentenced to Life Imprisonment Is Not Entitled to Have the Court Appoint Counsel Upon Request to Represent Him for the Purpose of Appealing His Conviction in the Absence of Any Allegation That He Is a Pauper or That His Own Counsel has Withdrawn from the Case.**

This case arises from a petition for a writ of habeas corpus filed in the Law and Equity Court of the City of Richmond. The Petitioner set forth his ground for relief in said petition as follows:

> "No. 1. Petitioner was denied Due Process of Law and Equal Protection when the Hustings Court, Part Two, of the City of Richmond, denied him an Appeal from its judgment render on the 10th day of April 1953, and in that, failing to aid sufficiently the intended appeals of the Appellant. See Exhibit 'C' and 'D', annexed hereto."

It is important to observe that the petitioner did not allege that he was a pauper; that he was indigent or that he was without funds after his conviction in the Hustings Court of the City of Richmond, Part II, in April of 1953. Now it is suggested, by counsel for the petitioner in his brief filed in this Court, that Newsom was indigent; that he was a pauper and that he was without funds in April of 1953. The respondent will show that the record does not support this assumption made by counsel for the petitioner.

As pointed out in the preliminary statement, it is essential to the understanding of the issue presented in this case that the prior proceedings in which the petitioner has been involved be set forth and their relationship to the case at bar be explained. In this connection we have included in the Appendix the order of the United States Court for the Eastern District of Virginia, Norfolk Division, denying and

dismissing Newsom's petition for a writ of habeas corpus (Appendix I). The memorandum opinion of Honorable Walter E. Hoffman, the United States District Judge who entered the aforementioned order of April 11, 1958, is printed as Appendix II. This Court can, of course, take judicial notice of a habeas corpus proceeding brought in a federal court. *Wells* v. *United States*, 318 U. S. 257, 87 L. Ed. 746, 63 S. Ct. 582. Judge Hoffman wrote a lengthy opinion setting forth the entire history of the petitioner's efforts to secure his release. The pertinent portions of this opinion will be briefly summarized.

On April 10, 1953, petitioner was brought before the Hustings Court of the City of Richmond, Part II, to be tried on an indictment charging him with murder. He was represented by Percy S. Smith and Robert J. Smith who had been *selected and employed by the accused.* The trial judge certified the testimony of three of the witnesses and this was contained in the record before the District Court. The testimony reveals that the petitioner had been having illicit relations with the victim's wife for seven years and, when rejected by her, had shot and killed her husband. The jury brought in a verdict of life imprisonment, and the trial judge changed the form of the verdict which was then signed by the jury foreman. Counsel for the accused moved the Court to set aside the verdict, but gave no grounds in support of his motion. The accused requested additional time to summon witnesses, which request the Court denied and proceeded to sentence him in accordance with the jury's verdict. The final order, entered by the Court on April 10, 1953, listed the names of only eleven jurors, having omitted the name of one Kendrick Duncan.

Following his admission to the penitentiary, petitioner addressed a letter to the trial judge on April 18, 1953, noting

an appeal and indicating that he would attempt to secure counsel to prosecute such appeal. On April 23, 1953, the petitioner requested the trial judge to appoint counsel for the purpose of perfecting said appeal to the Supreme Court of Appeals of Virginia. Judge Hoffman said: "*It should be noted, however, that petitioner did not state that he was a pauper, as he merely said that due to circumstances beyond his control he was unable to complete his appeal.*" (Emphasis added) No appeal was ever taken to the Supreme Court of Appeals of Virginia.

On March 20, 1956, petitioner filed a petition for a writ of habeas corpus in the Hustings Court of the City of Richmond, which court made the writ returnable to the Hustings Court of the City of Richmond, Part II. The trial judge of the latter court disqualified himself from consideration of the case and a judge was designated to hear the same. On April 4, 1956, the Hustings Court, Part II, continued the habeas corpus proceeding generally, for the reason that "there are matters presently pending before the Supreme Court of Appeals of Virginia, the adjudication of which may be determinative of matters herein."

On November 1, 1956, the Assistant Attorney for the Commonwealth of Virginia for the City of Richmond filed a motion in the original criminal proceeding requesting the entry of a *nunc pro tunc* order showing that at the trial and conviction of Newsom on April 10, 1953, the jury consisted of twelve persons, including Kendrick Duncan, rather than only the eleven names as erroneously stated in the order of April 10, 1953. An order to show cause was entered on November 1, 1956, and an attorney was appointed to represent Newsom in the *nunc pro tunc* proceeding.

A hearing was held on November 12, 1956, and, after hearing evidence and argument of counsel, a *nunc pro tunc*

order was entered by the same trial judge who presided over the original trial correcting the inadvertent omission of the name of Kendrick Duncan from the order of April 10, 1953. This order is printed for the convenience of this Court as Appendix IV. Newsom requested the appointment of counsel to prosecute a writ of error to this judgment of November 12, 1956, and an attorney was designated for this purpose. Said attorney was instructed by the petitioner to abandon the appeal in January of 1957.

On March 1, 1957, the habeas corpus matter was heard by a judge designate, and an order was entered denying and dismissing the petition. The Supreme Court of Appeals of Virginia denied a petition for a writ of error to this judgment of the Hustings Court of the City of Richmond, Part II, on October 16, 1957. The Supreme Court of the United States denied certiorari on March 3, 1958.

Thereafter, the petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia, which court denied said petition by order of April 11, 1958. The United States Court of Appeals for the Fourth Circuit dismissed the petitioner's appeal from the judgment of the District Court on December 5, 1958. *Newsom* v. *Smyth*, 261 F. 2d 452 (Appendix III). The Supreme Court of the United States denied certiorari to the judgment of the United States Court of Appeals on April 20, 1959.

Thereafter, the petitioner filed his petition for a writ of habeas corpus in the Law and Equity Court, which petition was denied on June 3, 1959. The Supreme Court of Appeals of Virginia denied his petition for a writ of error on October 13, 1959. On November 3, 1959, Newsom filed his petition for a writ of certiorari in this Court. While his petition for writ of certiorari was pending in this Court, he filed a peti-

tion for a writ of *coram vobis* in the Hustings Court for the City of Richmond, Part II, which petition was denied on April 28, 1960 (Appendix V). This Court granted certiorari in this case on May 31, 1960. Thereafter, Newsom filed a petition for a writ of error to the judgment in the *coram vobis* proceeding in the Supreme Court of Appeals of Virginia, which Court denied said petition on October 10, 1960 (Appendix VI). He apparently has not sought certiorari to this Court to the judgment of the Supreme Court of Appeals of Virginia of October 10, 1960.

Having set forth the petitioner's previous endeavors to secure his release, we now turn to the question as to whether or not he was entitled to have the trial court appoint an attorney to assist him in appealing his conviction of April 10, 1953. On April 23, 1953, the petitioner wrote the following letter to the trial judge:

"500 Spring Street
"April 23, 1953

"Honorable Mr. Ray Doubles
"Hustings Court Part II
"Richmond, Va.

"Your Honor:

"Due to circumstances beyond my control, I have been unable to complete arrangements with an attorney to complete my appeal.

"Therefore, I respectfully request that you appoint me counsel to appeal my case to the State Supreme Court of Appeals.

"Respectfully yours,

"Stuart W. Newsom
"#63646" (R. 14)

The petitioner's entire case is based upon this letter. He does not state why he was unable to "complete arrangements with an attorney" to assist him in appealing his case. We can only speculate as to the substance of the unstated circumstances. The trial judge was, of course, aware of the fact that the petitioner had been represented by counsel of his own choosing at his trial, and there is no indication that these two attorneys had withdrawn from the case. Indeed, if they had withdrawn from the case, Newsom did not inform the trial judge of this fact. Moreover, the petitioner did not state that he was a pauper, that he was indigent or that he was without funds and that he was, therefore, "unable to complete arrangements with an attorney" to assist him in perfecting an appeal.

Judge Hoffman, the United State District Judge who denied Newsom's petition for a writ of habeas corpus, stated in his opinion that: *"It should be noted, however, that petitioner did not state that he was a pauper as he merely said that due to circumstances beyond his control, he was unable to complete his appeal."* (Emphasis added)

Moreover, the petitioner's allegation as to the illegality of his detention is set forth in his petition for a writ of habeas corpus filed in the Law and Equity Court, and is quoted below:

> "#1. Petitioner was denied Due Process of law and Equal Protection when the Hustings Court Part Two, of the City of Richmond, denied him an Appeal from its judgment render on the 10th day of April 1953, and in that, failing to aid sufficiently the intended appeals of the Appellant. See Exhibit 'C' and 'D', annexed hereto." (R. 4)

A careful examination of the petition for a writ of habeas corpus reveals that the petitioner did not suggest, allege,

state or contend that he was indigent on April 23, 1953. Moreover, the petitioner has never asserted in any of the various pleadings, briefs, petitions or other documents which he has filed in the Law and Equity Court, the Supreme Court of Appeals of Virginia or in this Court that he was indigent on April 23, 1953. We are, therefore, unable to understand the assumption made by counsel for the petitioner in this Court that Newsom was indigent on April 23, 1953. Indeed, the record does not show that Newsom was indigent on the day in question.

Counsel for the petitioner suggests that the Judge of the Law and Equity Court who wrote a memorandum opinion, which accompanied the order denying the relief requested, "recognized that the petitioner was in fact indigent on April 23, 1953." This assumption of petitioner's counsel is plainly without merit. Judge Young said in the first paragraph of his opinion:

> "In this proceeding the petitioner seeks a writ of habeas corpus, alleging in his petition that he was denied due process of law and equal protection of law in that the trial court 'denied' him an appeal and failed to 'aid sufficiently' a proposed appeal. The facts recited, which must be accepted as true in ascertaining whether probable cause has been shown, are to the effect that 'shortly after conviction petitioner made known his desire to petition the Supreme Court of Appeals of Virginia for a writ of error and requested the trial court to appoint an attorney to handle the matter, which was not done." (R. 23)

The facts which Judge Young accepted as true were those facts as set forth in the petition. As hereinbefore pointed out, the petition did not allege that Newsom was indigent in April of 1953. Judge Young then reviewed the

cases which deal with the constitutional right of the accused to have the court appoint counsel, both at the time of trial and in appealing his judgment of conviction. These cases necessarily deal with indigents and paupers for, of course, there is no reported case of which we are advised which holds that an accused is entitled to court-appointed counsel in a criminal proceeding when he is not indigent. In discussing these cases, Judge Young concludes his opinion with this paragraph:

> "With us an accused is entitled to one fair trial involving 'no bending or breaking of his constitutional rights.' Michie's Jurisprudence, Vol. 5, p. 368. Neither in the state or federal constitution is to be found any provision requiring counsel for a proposed application for a writ of error. In the case of mere errors committed by the trial court relief may be sought at the suit of the convicted person in the usual way. Detention under color of a void conviction, for which relief may be granted by habeas corpus, must involve an absence of a valid law the violation of which was charged, a lack of jurisdiction in the trial court of the crime charged or of the person [fol. 32] of the accused, or a failure of the trial court to accord to the accused those procedural safeguards guaranteed to him by the state and federal constitutions. The petition for habeas corpus in the instant case fails to allege any of these things." (R. 31)

Nowhere in this lengthy opinion does Judge Young state, or even suggest, that Newsom was indigent in April of 1953. It is, therefore, manifest that Judge Young did not assume or recognize that Newsom was without funds in April of 1953.

To date, the only person who has even suggested that Newsom was indigent is the able and experienced attorney

who has been appointed to represent the petitioner before this Court. Newsom did not advise the Judge to whom his letter of April 23 was addressed that he was without funds and unable to secure counsel. The pleadings heretofore filed in the case at bar have been prepared and signed by the petitioner. Newsom has never even suggested that he was indigent on April 23, 1953. The record before this Court is silent as to the financial condition of the petitioner in April of 1953. In view of this fact, and for the reason that the petitioner does not and has never alleged or claimed that he was indigent, it is manifest that he was not a pauper at the time he made his request for court-appointed counsel to assist him in perfecting an appeal to the Supreme Court of Appeals of Virginia.

The petitioner asserts in his brief that the trial court deprived him of his constitutional rights under the Fourteenth Amendment when the Judge failed to appoint counsel to assist him in appealing his conviction of April 10, 1953. He points first to some of the many cases which held that an indigent defendent is, under the Fourteenth Amendment, entitled to have counsel to represent him in the trial court. *Uveges* v. *Pennsylvania* (1948), 335 U. S. 437, 93 L. Ed. 127, 69 S. Ct. 184. We fully agree with petitioner's contention. Indeed, the Supreme Court of Appeals of Virginia has long recognized the fundamental right of an accused to have the assistance of counsel. *Barnes* v. *Commonwealth* (1895), 92 Va. 794, 23 S. E. 784.

Petitioner argues that this Court "has made the further definite indication that the right to counsel should not terminate at the end of the trial, but must continue throughout the intricacies of appeal." In support of this argument, he cites *Johnson* v. *United States* (1957), 352 U. S. 565, 1 L. ed. 2d 953, 77 S. Ct. 550, and *Ellis* v. *United States* (1958), 356 U. S. 674, 2 L. ed. 2d 1060, 78 S. Ct. 974.

The *Ellis* case involved a refusal of the United States Court of Appeals for the District of Columbia to permit an indigent to appeal in *forma pauperis*. This Court noted that the appeal should not be denied until the indigent had been afforded adequate representation by counsel, and cited the case of *Johnson* v. *United States*, *supra*. In *Johnson* v. *United States*, the United States Court of Appeals for the Second Circuit had denied an indigent the right to appeal in light of the refusal of the District Judge to certify that the appeal was taken in good faith. This Court observed that "Moreover, a court of appeals, must under *Johnson* v. *Zerbst*, 304 U. S. 458, 82 L. ed. 2d 1461, 58 S. Ct. 1019, 146 A. L. R. 357, afford one who challenges that certification the aid of counsel unless he insists on being his own."

*Johnson* v. *Zerbst*, *supra*, involved a prisoner convicted in a federal court without counsel on a charge of possessing and uttering counterfeit money. After his trial, he apparently was not allowed to secure counsel to appeal his case. This Court's opinion, which held as stated above, was predicated upon an interpretation of the Sixth Amendment to the Constitution of the United States. Therefore, these cases have no bearing on the question presented, because the Sixth Amendment is not applicable to State court proceedings. *Betts* v. *Brady* (1942), 316 U. S. 455, 86 L. ed. 1595, 62 S. Ct. 1252.

The petitioner argues that the right of an indigent to court-appointed counsel to assist him on appeal is within the scope of this Court's opinion in *Griffin* v. *Illinois* (1956), 351 U. S. 12, 100 L. ed. 891, 76 S. Ct. 585. We will demonstrate that this argument is clearly without merit. In *Griffin* the indigent petitioners were tried and convicted of armed robbery in the State of Illinois. They petitioned the trial court to furnish them with a certified copy of the entire record, including a stenographic transcript of the pro-

ceedings. They alleged that they were paupers. The trial court denied petitioners' request. Under Illinois law it was necessary that such record be prepared. Without the same the petitioners could not appeal. Moreover, without the aid of the stenographic transcript of the trial proceedings, the petitioners could not attack errors not apparent upon the face of the record.

It is stated in the majority opinion in *Griffin* that "We must, therefore, assume for purposes of this decision that errors were committed in the trial which would merit reversal, but that the petitioner could not get appellate review of these errors solely because they were too poor to buy a stenographic transcript." (351 U. S. 16)

In the case at bar there is no allegation that there were any errors committed in the trial court. The record is silent in this regard. Moreover, in view of the lengthy history of the petitioner's efforts to secure his release, it is manifest that there were no errors committed in the trial which would merit reversal. The petitioner, though a layman, is clearly experienced in the so-called intracacies of appeal. He has filed three separate petitions for writs of habeas corpus; he has applied for a writ of error on two occasions to the Supreme Court of Appeals of Virginia; he has appealed once to the United States Court of Appeals for the Fourth Circuit, and he has applied for certiorari to this Court on three occasions. He has shown that he is fully aware of all of the steps necessary to the filing of a petition for appeal to an appellate court. He is well versed in appellate procedure. It is, therefore, quite clear that petitioner did not need the assistance of counsel to prepare an appeal of his criminal conviction to the Supreme Court of Appeals of Virginia. Moreover, had he been successful in securing a writ of error, the cost of the printing of the record would have been paid for by the Commonwealth, if he were a

pauper. (Section 19-262, Code of Va. (1950)). He, of course, does not allege that he was a pauper. The refusal of the trial court to appoint an attorney to represent the petitioner on appeal was not a denial of the right of appeal.

The *Griffin* decision is not applicable herein for several reasons. In the first instance, Griffin and Crenshaw had alleged that they were indigent, and admittedly they were. Newsom has never made such an allegation. Griffin alleged that there were errors in the trial court, which could only be appealed with the aid of a transcript. Counsel for Illinois conceded that Griffin needed a stenographic transcript in order to secure adequate appellate review. Newsom has not alleged that there were errors in the trial court and, in so far as we are advised, there were no errors which would have merited reversal on appeal. In addition, it is quite clear, based on Newsom's many court proceedings, that he was fully capable of filing a petition for a writ of error to the Supreme Court of Appeals of Virginia if he so desired. In *Griffin* the petitioners were in effect denied an appeal. Newsom has never been denied an appeal. Mr. Justice Frankfurter pointed out in his concurring opinion in *Griffin* that:

> "The case of these petitioners is that the only adequate means of bringing for review allegedly fatal trial defects resulting in a potentially reversible conviction was a bill of exceptions which their poverty precluded them from securing. The order of the Illinois Supreme Court and the argument of the Attorney General of Illinois in support of the court's judgment apparently assumed that that was the case. * * *." (351 U. S. 24)

We have shown conclusively that the facts in *Griffin* are totally different from those in the case at bar, and that

the rule expounded by the court in that case is not applicable herein.

In *Eskridge* v. *Washington State Board* (1958), 357 U. S. 214, 2 L. ed. 2d 1269, 78 S. Ct. 1061, and *Burns* v. *Ohio* (1959), 360 U. S. 252, 3 L. Ed. 2d 1209, 79 S. Ct. 1164, the petitioners had been denied the right to appeal because of lack of funds. In both cases the State did not contend that the petitioners were not indigent. In *Eskridge* the petitioner sought a transcript in order to complete his appeal. In *Burns* the petitioner was barred from obtaining appellate review by action of the Clerk of the Supreme Court of Ohio. The facts in both of these cases are unlike those in the case at bar and, consequently, the court's decisions have no application here.

Moreover, *Chessman* v. *Teets* (1957), 354 U. S. 156, 1 L. Ed. 2d 1253, 77 S. Ct. 1127, is not authority for the petitioner in the case at bar. California denied Chessman the right to be present when a disputed transcript of the evidence was prepared for the purpose of appeal. This Court did not, as suggested by the petitioner, recognize "that the constitutional right to counsel continued after trial and into the appellate process." The majority of this Court recognized Chessman's right to be present in person or to be represented by counsel in such proceeding. Mr. Justice Harlan, speaking for the Court said: "We think the petitioner was entitled to be represented throughout those proceedings either in person or by counsel. * * * If California chose to deny petitioner's request to appear in those proceedings in *propria persona*, it then became encumbent upon the State to appoint counsel for him." (354 U. S. 162). This indicates that a petitioner may represent himself on appeal and is only entitled to court-appointed counsel when the State denies him the right to perfect his own appeal.

The decisions of the lower Federal courts and State courts, cited by the petitioner, involved equally distinguishable factual situations, and we shall not overburden the body of this brief by discussing them.

The petitioner attempts to extend this Court's rulings that an indigent defendant is entitled to court-appointed counsel in the trial court to the appellate proceedings which may follow a judgment of conviction. Of course, the prosecution by the Commonwealth ends in the trial court. Had the petitioner chosen to appeal his conviction, the case would have been styled "Stuart W. Newsom, *Plaintiff in Error* v. Commonwealth of Virginia, *Defendant in Error*." The proceeding ceases to be a criminal prosecution when judgment is entered in the trial court and becomes a proceeding brought by the defendant as *plaintiff in error* to secure a reversal of the trial's court's ruling. It is further noted that the right of the accused to be present in the trial court at all times ceases at the conclusion of the case. It is not necessary that the convicted felon appear in the appellate court when his case is argued or when the decision is handed down. *Powell* v. *State*, 132 Tenn. 349, 178 S. W. 768. The appellate proceedings are not a continuation of the prosecution brought by the Commonwealth, but constitute a case brought by the convicted felon. If the appellate court affirms the rulings of the trial court, this does not constitute the entering of judgment against the *plaintiff in error* and require that he be present. The constitutional guarantees provided for the protection of persons accused of a crime apply to the court of original jurisdiction which pronounces sentence, and not to the appellate court. *Schwab* v. *Berggren* (1892), 143 U. S. 442, 36 L. Ed. 218, 12 St. Ct. 525.

In view of the foregoing, it is manifest that the record before this Court does not present a constitutional question

in a "clean cut, * * * concrete, and unclouded * * *" form usually demanded for a decision of constitutional issues. *Rescue Army* v. *Municipal Court of Los Angeles* (1947), 331 U. S. 549, 91 L. Ed. 1666, 67 S. Ct. 1409. To decide the constitutional question raised by the petitioner on the record before this Court would constitute a decision of a question which is not raised by the record.

The inadequacy of petitioner's request for court-appointed appellate counsel to the trial court is clear. It is noted that, at the conclusion of the *nunc pro tunc* proceeding, the petitioner, then a pauper, requested from the trial court court-appointed appellate counsel. The court immediately appointed an attorney to assist the petitioner in perfecting his petition for a writ of error. The appeal was later abandoned at the direction of the petitioner, and he is now detained under this court order. In this instance, he made a proper demand for counsel, for he stated that he was indigent.

In the case at bar, the petitioner failed to advise the trial court that he was without funds. In the absence of such a statement of poverty, an allegation of error on the part of the trial court, or a statement that petitioner's employed counsel had withdrawn from the case, it is clear that petitioner has failed to show that the trial court should have appointed counsel to assist him in appealing his conviction. In addition, it has been demonstrated that the petitioner was perfectly capable of appealing his conviction without the aid of counsel. Moreover, it is noted that petitioner has secured several adjudications of the propriety of his detention without aid of counsel. In recent months he filed a petition for a writ of *coram vobis*, which was denied by the trial court, which decision was affirmed by the Supreme Court of Appeals of Virginia.

The petitioner has cited no decision of this Court which supports the view that, in the absence of a statement of poverty or an allegation of indigency, an accused is entitled to court-appointed counsel in the trial court. It is, therefore, manifest that, in the absence of a statement of poverty, a convicted felon is not entitled to court-appointed appellate counsel. For these reasons it is quite clear that petitioner has failed to present a Federal question.

## CONCLUSION

For the foregoing reasons counsel for the respondent respectfully submit that the petitioner has failed to present a Federal constitutional question, and that the judgment of the Supreme Court of Appeals of Virginia should be affirmed.

Respectfully submitted,

A. S. Harrison, Jr.
*Attorney General of Virginia*

Reno S. Harp, III
*Assistant Attorney General*

Supreme Court–State Library Building
Richmond 19, Virginia

# APPENDIX

## APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISRICT OF VIRGINIA

Norfolk Division

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STUART W. NEWSOM,

*Petitioner*

v.

W. FRANK SMYTH, JR., Superintendent
of the Virginia State Penitentiary

*Respondent*

**Order**

For reasons stated in a memorandum this day filed, it is *Ordered* that the petition of Stuart W. Newsom for a writ of habeas corpus be and the same is hereby filed without requiring the prepayment of costs and fees, and it is further

*Ordered* that said petition for writ of habeas corpus be and the same is hereby discharged and dismissed without prejudice to the right of said petitioner, if he be so advised, to apply to the United States District Court for the Eastern District of Virginia, Richmond Division, for an appropriate hearing with respect to the question of whether all 12 jurors were present during all necessary times throughout the trial on April 10, 1953, but without suggesting to said United States District Judge that a hearing should be granted thereon.

Let copies of the Court's memorandum and order herein be forwarded by the Clerk of this Court to the petitioner and to the Attorney General of Virginia.

(s) Walter E. Hoffman
United States District Judge

April 11, 1958
Norfolk, Virginia

## APPENDIX II

### Memorandum

In this proceding by way of habeas corpus petitioner, a state prisoner presently confined for the period of his natural life, seeks the issuance of an order to show cause directed out of this Court.

From the petition and attached exhibits it appear that petitioner was indicted for the murder of one James F. Brown in the Hustings Court of the City of Richmond, Part II, on July 14, 1952. Pursuant to an order of said court, he was admitted to Southwestern State Hospital for observation and report on July 31, 1952. Under date of January 6, 1953, the Hospital reported that petitioner "was not now insane and that he has not been insane or psychotic since admission".

On April 10, 1953, petitioner was brought to trial in said Hustings Court. He was represented by Percy S. Smith, a Richmond attorney, and apparently assisted by Robert J. Smith; the firm practicing under the name of Smith & Smith. These attorneys were employed and selected by petitioner. While no transcript of the evidence is available, a summary was prepared and signed by counsel under date of September 24, 1953, with the learned trial judge certifying that he had written the testimony of three of the witnesses on the day following the trial. The sordid facts are that petitioner had been having intimate relations with the victim's wife over a period of nearly seven years and, when finally rejected by the wife, petitioner shot and killed the husband.

When called upon to plead to the indictment, petitioner stood mute and the court ordered the entry of a plea of not guilty. Petitioner did not testify but presented two witnesses tending to show that the victim's wife was as much responsible for the overall situation as petitioner. No plea of in-

sanity was suggested or interposed by petitioner or his counsel.

The jury initially brought forth a verdict in the handwriting of the jury foreman reading as follows:

> "The unanimous decision of the Jury is Life imprisonment.
>
> R. H. Harvey — Foreman".

Upon noting the form of the verdict, the trial judge, according to the petitioner, declined to accept the same and, without instructing the jury to retire and deliberate further as to the form of the verdict, proceeded to write in his handwriting the following verdict:

> "We the jury on the issues joined find the defendant guilty of murder in the first degree as charged in the indictment and fix his punishment at life imprisonment in the penitentiary."

The judge thereupon handed the verdict (as revised) to the jury foreman who proceeded to affix his signature and the date.

Counsel for petitioner moved the court to set aside the verdict but gave no grounds in support of his motion. The court overruled the motion and petitioner's counsel excepted. The court then asked petitioner if he had anything to say as to why sentence should not be pronounced, whereupon petitioner broke his silence and stated that he should not be sentenced as his attorney had failed to introduce certain evidence in his behalf, and further asked that he be given ten days within which to produce such evidence. The court denied this request, the defendant excepted, and the court proceeded to pronounce sentence in accordance with the period fixed by the jury.

The final order of the court entered on April 10, 1953, listed the names of only eleven jurors, having omitted the name of one Kendrick Duncan.

Following his admission to the penitentiary, petitioner addressed a letter to the trial judge on April 18, 1953, noting an appeal and indicating that he would endeavor to secure counsel. Five days later, on April 23, another letter requested the trial judge to appoint counsel for the purpose of perfecting an appeal to the Supreme Court of Appeals of Virginia.[1] According to petitioner, these letters were not acknowledged by the trial judge. It should be noted, however, that petitioner did not state that he was a pauper, as he merely said that due to circumstances beyond his control he was unable to complete his appeal. It appears that no appeal was ever taken from the final judgment of the court.

Petitioner thereafter complained to the Virginia State Bar as to the incompetency of his privately employed counsel and, according to the present application, the matter was rejected by the State Bar a few days prior to September 24, 1953. On this latter date the trial judge addressed a letter to the Parole Board recommending that petitioner *never be pardoned or paroled*. It is not clear from the record whether this letter was in response to a requested recommendation, or whether the trial judge acted on his own initiative. The letter is dated on the day following the preparation of the certification of the evidence and incidents of trial by the court and counsel.

Apparently the matter remained dormant until March 20, 1956, when petitioner filed an application for a writ of habeas corpus addressed to the Honorable W. Moscoe Hurtly, Judge of the Hustings Court of the City of Richmond, upon which application a writ was issued returnable to the Hustings Court of the City of Richmond, Part II, on April 10, 1956. The trial judge of the latter court thereupon

certified that he would be a witness in the case and stated: "I hereby disqualify myself from consideration of any of the incidents of the trial hereof." One of the Justices of the Supreme Court of Appeals of Virginia proceeded, in accordance with the law, to designate the Honorable Harold F. Snead, Judge of the Tenth Judicial Circuit, to preside in place of the Honorable M. Ray Doubles at the habeas corpus hearing.

The exhibits now presented to this court do not reveal the contents of the petition for a writ of habeas corpus in the state court but obviously one of the grounds alleged was the fact that, according to the record, the trial was conducted by a jury of eleven. This assumption is apparent as the Supreme Court of Appeals of Virginia then had before it for consideration the case of *Council* v. *Commonwealth*, 198 Va. 288, 94 S. E. (2d) 245, which was later decided on September 4, 1956. On April 4, 1956, the Hustings Court continued generally the return date of the writ previously designated as April 10, 1956, reciting that "there are matters presently pending before the Supreme Court of Appeals of Virginia, the adjudication of which may be determinative of matters herein." Petitioner filed a further petition on April 23, 1956, which was denied, but the nature of this application is not indicated.

Following the decision of the Supreme Court of Appeals of Virginia in *Council* v. *Commonwealth*, *supra*, and while the habeas corpus matter remained in a "continued generally" status, the Assistant Attorney for the Commonwealth filed a motion in the original criminal proceeding of *Commonwealth* v. *Newsom* requesting the entry of a *nunc pro tunc* order showing that at the trial and conviction of Newsom on April 10, 1953, the jury consisted of twelve persons including Kendrick Duncan, rather than only the eleven names as erroneously stated in the order of April 10, 1953. An

order to show cause was entered on November 1, 1956, an attorney was appointed to represent Newsom, and the Superintendent of the State Penitentiary was directed to produce Newsom on November 12, 1956. On this latter date, after hearing evidence and argument of counsel, an order was entered by the same trial judge who presided over the original trial; the substance of said order being to the effect that the juror, Duncan, did serve as such, and a nunc pro tunc order was entered as of April 10, 1953, inserting the name of Kendrick Duncan as one of the jurors, thereby correcting the inadvertent omission which is precisely what was held by a divided court to be proper in *Council* v. *Commonwealth*, *supra*, although the decision reversed prior holdings of the same court.

From this *nunc pro tunc* order in *Commonwealth* v. *Newsom*, the present petitioner requested the appointment of counsel to prosecute a writ of error to the judgment of November 12, 1956. An attorney was designated for this purpose and, on or about January 4, 1957, was instructed by petitioner to abandon the appeal. Out of an abundance of precaution the court entered an order directing Newsom to indicate in writing his intentions with respect to abandoning the appeal. Petitioner wrote on said order, "For lack of funds to pay cost I am forced to abandon the appeal". At the time stated, petitioner had to his credit in his spending account at the State Penitentiary the sum of $100.74. On January 22, 1957, the court entered an order relieving the court-appointed attorney from further responsibility as counsel.

The habeas corpus proceeding was then revived and, on February 12, 1957, an order was entered directing the respondent Superintendent to produce Newsom before the court on March 1, 1957. When the hearing was had the presiding judge (not the trial judge in the original criminal

proceeding) heard the evidence and argument of counsel, and thereupon entered the following order:

"This day came the petitioner, Stuart W. Newsom, in person and by counsel, and the respondent by counsel, and the whole matter of law and fact was heard by this Court.

"And it appearing to the Court from the testimony that all twelve jurors were lawfully present and together at all necessary times throughout the original trial on April 10, 1953, and that the verdict, as reworded, was affirmed by the jury as a group to be their verdict, with an individual poll of jurors being specifically waived by counsel selected by the defendant, Stuart W. Newsom, and that the final verdict of the jury is lawful and valid in all respects.

"And it further appearing to the Court that the other allegations of the petition filed herein are without merit;

"It is considered by the Court that the detention by the respondent of the petitioner under the judgment of conviction on April 10, 1953, and as amended by order of November 12, 1956, of this Court is in all respects lawful and valid.

"It is further considered by the Court that there was no denial of due process of law under the Federal or State constitution in said conviction and all matters raised by the petition with regard to said conviction were known to petitioner and his counsel at the time of said conviction and likewise within the appeal period for the said case.

"It is further considered by the Court that the prayer of the petition be, and the same is, hereby denied; and the said writ of habeas corpus is discharged and the said petition dismissed and the petitioner is remanded to the custody of the respondent.

"To all of which foregoing action of the Court the said petitioner by counsel duly excepts and objects."

The Supreme Court of Appeals of Virginia denied the writ of habeas corpus by order entered on October 16, 1957. A writ of certiorari was denied by the United States Supreme Court on March 3, 1958.

The present petition was received by this Court on March 31, 1958. Summarizing the contentions of petitioner, they appear to be:

(1) The trial judge of the state court was without authority to rewrite in his own handwriting the verdict of the jury, as he should have followed the course of directing the jury to retire after giving further instructions as to the form of the verdict; hence the verdict is void as it does not constitute the verdict of the jury.

(2) When the revised verdict of the jury was being written by the trial judge and thereafter signed by the jury foreman, one of the jurors was not present in the courtroom.

(3) Petitioner was denied the service of effective counsel.

(4) The trial judge denied petitioner a fair trial by declining to allow a period of ten days to produce evidence when this request was made immediately prior to sentencing and subsequent to the receipt of the revised jury verdict.

Where there have been prior determinations of substantially identical federal issues by the highest state court with jurisdiction, whether through affirmance of the judgment on appeal or denial of post-conviction remedies, there is no absolute right on the part of a state prisoner to a hearing in the federal court on his application for writ of habeas corpus. If the record of the application affords an adequate opportunity to weigh the sufficiency of the allegations and the evidence, and no unusual circumstances calling for a hearing are presented, a repetition of the trial is not required. *Brown*

v. *Allen*, 344 U. S. 443, 460, 463. The present application, in the opinion of the court, falls within the framework of the foregoing authority.

The order of March 1, 1957, discloses in detail the extent to which the state court sought to determine whether the juror, Kendrick Duncan, absented himself from the courtroom at any time while the trial judge was rewording the jury verdict and the foreman was signing same. It points out that the verdict, as reworded, was affirmed as a group to be their verdict, and that an individual poll of jurors was specifically waived by petitioner's personally selected attorney. It recites that all twelve jurors were lawfully present and together at all necessary times throughout the trial of April 10, 1953. The order concludes by noting that there was no denial of due process of law under the federal or state constitutions, and all matters raised by petitioner with regard to his conviction were known to petitioner and his counsel at the time of his conviction and within the appeal period.

Petitioner does not suggest wherein he could aid his cause by a rehearing of the same factual situation heard by the state court on March 1, 1957. He states that he personally observed a juror leave his seat and go into the cloakroom, and that he did not see the juror return. He indicates that, upon a hearing in this court, the entire jury panel would be called to testify. These were matters fully considered by the state court in a prior habeas corpus proceeding at which time evidence was presented. The present petition presented to the district court at Norfolk would necessitate a hearing and the attendance of twelve jurors residing in the City of Richmond. Without an affidavit from at least one of the jurors to the effect that all twelve jurors were not actually present and together at all times, the court is of the opinion

that the procedure followed should be as stated in *Brown* v. *Allen*, *supra* (p. 465):

> "As the state and federal courts have the same responsibilities to protect persons from violation of their constitutional rights, we conclude that a federal district court may decline, without a rehearing of the facts, to award a writ of habeas corpus to a state prisoner where the legality of such detention has been determined, on the facts presented, by the highest state court with jurisdiction, whether through affirmance of the judgment on appeal or denial of post-conviction remedies."

To the end that petitioner's rights may be fully protected, in dismissing the petition with respect to this phase of the case, the same shall be without prejudice to his right to apply to the district court at Richmond which is a court convenient to the place of litigation and, in the discretion of the presiding judge of that court, a hearing may be granted.

As to the authority of the trial judge to reword the verdict of the jury in his own handwriting, the material issue for determination is whether the verdict, as rewritten, affects the substantive rights of petitioner. The punishment for first degree murder is, under the Virginia law, fixed at death, life imprisonment, or a period of not less than 20 years. Code of Virginia, 1950, § 18-31. Second degree murder is punished by confinement in the penitentiary for a period of not less than 5 nor more than 20 years. Code of Virginia, 1950, § 18-32. Thus it will be seen that, in fixing petitioner's punishment at life imprisonment, the degree of guilt must have been first degree murder. The Virginia statute requires that, when a person is found guilty of murder by a jury, the jury shall "in their verdict fix the degree thereof and ascertain the extent of the punishment to be inflicted within the bounds prescribed by § 18-31 and 18-32". Code

of Virginia, 1950, § 19-223. The latter section has, however, been interpreted by the Supreme Court of Appeals of Virginia in Hobson v. Youell, 177 Va. 900, 15 S. E. (2d) 76, wherein the judgment order failed to fix the degree of guilt but imposed a sentence of fifty years' imprisonment. The court said:

> "There is no doubt or confusion as to the degree of the offense of which the petitioner was convicted, as shown in the judgment. Fifty years' confinement in the penitentiary clearly indicates that the court ascertained the petitioner to be guilty of murder in the first degree. *Eichis* v. *Com.*, 129 Va. 774, 106 S. E. 333."

Aside from the Hobson case, which is controlling, it is well settled that when a state court has jurisdiction of an indictment for murder, and the laws of the state divide that offense into two degrees and make it the province of the jury to determine under which degree the case falls, the conviction of the accused of murder in the first degree and sentence accordingly, without a finding as to which degree he was guilty of, though erroneous, is not a jurisdictional defect remediable by writ of habeas corpus. *In re Eckart*, 166 U. S. 481, 17 S. Ct. 638, 41 L. Ed. 1085.

Manifestly, therefore, the rewording of the jury verdict by the trial judge was for the purpose of correcting formal mistakes in the verdict—a duty imposed upon him by virtue of his office—the reworded verdict did not change the substance of the jury's finding. *Zedd* v. *Jenkins*, 194 Va. 704, 74 S. E. (2d) 791. While the safer practice would seem to suggest that the jury be directed to retire, after giving further instructions relating to the form of the verdict, the jury's affirmance in open court of the verdict as reworded is sufficient when the substance is not changed.

Little need be said with respect to the petitioner's contention that he was deprived of "effective" assistance of his personally selected counsel. Disgruntled prisoners frequently seek to place the blame for their conviction upon their attorneys. In alleging ineffective representation of counsel, it is incumbent upon petitioner to show not only the type of representation, but also at which point such representation violated the provisions of the Constitution. The Sixth Amendment requiring that the accused shall have the assistance of counsel does not mean that constitutional rights of an accused are impaired by mistakes or mere lack of judgment on the part of counsel. The petitioner must show that the proceedings were, in substance, a farce and a mockery of justice. *Diggs* v. *Welch*, D.C.C.A., 148 F (2d) 667; *Powell* v. *Alabama*, 287 U. S. 45; *Moore* v. *Dempsey*, 261 U. S. 86; *Mooney* v. *Holohan*, 294 U. S. 103; *Brown* v. *Mississippi*, 297 U. S. 278; *Johnson* v. *Zerbst*, 304 U. S. 458. Undoubtedly there must be "effective" representation and negligence of an attorney may be one factor pointing to the violation of constitutional rights, but the instant proceeding is void of meritorious complaint during the actual trial prior to the receipt of the jury verdict other than a contention that petitioner was advised not to take the witness stand in his own defense and a reference to the fact that his attorney would not subpoena petitioner's witnesses. Petitioner fails to state the names and addresses of his proposed witnesses, and to what facts they would have testified. It is significant, however, that two witnesses testified at request of petitioner or his counsel. To accept petitioner's argument that habeas corpus should now be granted because his attorney advised him not to testify would open the gates of all prisons. Once again, petitioner does not intimate what his testimony would have been. The complaint that counsel

failed to state his grounds for the motion to set aside the jury verdict is equally without merit. Motions of this type are frequently made by counsel for the sole purpose of protecting rights in the event of appeal. Clearly counsel's conduct during the trial was not such as to impose a duty upon the court to intercede in petitioner's behalf.

The final point raised by petitioner is that, after the verdict and before pronouncement of sentence, petitioner personally requested an extension of ten days to secure witnesses to testify in his behalf. Witnesses are intended to be heard at the time the jury is hearing the case. The point contended by petitioner is frivolous. Moreover, petitioner again failed to disclose the identity of such witnesses and the nature of their testimony.

No good purpose could be served by granting a hearing in Norfolk on petitioner's application. He has received a fair and impartial trial and, while his petition is replete with charges of bias directed at the trial judge, no facts are stated which reflect that condition during the actual trial. Merely because the trial judge thereafter expressed his views against petitioner's parole and described him as a "cold-blooded murderer" carries no suggestion that bias existed in the administration of the court's judicial functions either during the trial or thereafter.

An order will be entered accordingly.

(s) Walter E. Hoffman
United States District Judge

Norfolk, Virginia
April 11, 1958

## APPENDIX III

The following is extracted from 261 Federal Reporter, 2d Series, pages 452-454:

STUART W. NEWSOM,

*Appellant,*

v.

W. FRANK SMYTH, JR., Superintendent of the Virginia State Penitentiary,

*Appellee.*

No. 7747

United States Court of Appeals
Fourth Circuit.

Argued Nov. 3, 1958.

Decided Dec. 5, 1958.

Habeas corpus proceeding brought by state prisoner. The United States District Court for the Eastern District of Virginia at Richmond, Sterling Hutcheson, Chief Judge, denied writ, and the prisoner appealed. The Court of Appeals, Haynsworth, Circuit Judge, held that where, under Virginia laws, sentence of life imprisonment is permissible upon conviction of murder in first degree but not for any lesser offense and unanimous decision of jury was for life imprisonment, it was apparent that jury intended to find defendant guilty of murder in first degree, and changing verdict by trial judge, who rewrote verdict to include finding that defendant was guilty of murder in first degree, was correction of the formal omission and not a change in the substance of finding of jury.

Appeal dismissed.

1. **Habeas Corpus — 113(6)**

Where state prisoner filed petition for writ of habeas corpus in federal court upon questions previously litigated in state courts and then undertook an appeal without certificate of probable cause, reviewing court would examine record and consider written and oral arguments of court-appointed counsel, but, finding no merit in prisoner's contentions, appeal would be dismissed for want of certificate of probable cause.

2. **Criminal Law — 996(1)**

The inadvertent omission of name of one juror in final order, after correction does not preclude subsequent finding based upon abundant evidence, that all twelve jurors were in fact present at all relevant times during trial.

3. **Criminal Law — 1208(3)**
**Homicide — 354**

Under Virginia law, jury is required to fix punishment of one convicted of homicide within the limits prescribed by statutes for the different offenses, and life imprisonment is permissible upon conviction of murder in first degree, but not permissible for any lesser offense.

4. **Criminal Law — 890**

Where, under laws of Virginia, sentence of life imprisonment is permissible upon conviction of murder in first degree but not for any lesser offense, and unanimous decision of jury was for life imprisonment, it was apparent that jury intended to find defendant guilty of murder in first degree, and change in verdict by trial judge, who rewrote verdict to include finding that defendant was guilty of murder in first degree, was correction of formal omission and not a change in the substantive finding of jury.

5. Habeas Corpus — 34

Federal District Court was not required to grant writ of habeas corpus as requested by defendant convicted in state proceedings and hold a further hearing to redetermine factual issues already resolved in state court proceedings upon basis of adequate records and testimony.

6. Habeas Corpus — 25.1(6)

Where defendant had been charged with murder of husband of his paramour and witnesses offered in his behalf had sought not to exculpate defendant but to implicate the paramour as having some moral responsibility for the crime, defendant's counsel's determination as matter of trial tactics, not to put his client upon witness stand, could not convert trial into a farce or a mockery of justice and did not entitle defendant to writ of habeas corpus on ground of insufficiency of his personally selected counsel.

7. Habeas Corpus — 25.1(1)

Where defendant had a full trial, he was not entitled to retrial upon basis of an unsupported statement that he would like additional time to produce unidentified witnesses whose possible testimony was not disclosed.

H. B. Mutter, Baltimore, Md. (Walter E. Black, Jr., Baltimer, Md., on brief), court-appointed counsel, for appellant.

Stuart W. Newsom, pro se, on brief.

Thomas M. Miller, Asst. Atty. Gen. of Virginia (A. S. Harrison, Jr., Atty. Gen. of Virginia, on brief), for appellee.

Before SOBELOFF, Chief Judge, and SOPER and HAYNSWORTH, Circuit Judges.

HAYNSWORTH, Circuit Judge.

[1] By a petition for a writ of habeas corpus, this state prisoner sought a hearing upon questions previously fully litigated in the state courts. He now undertakes an appeal to this Court without a certificate of probable cause. In accordance with our usual practice, we have examined the record and have considered the written and oral arguments of court-appointed counsel, but, finding no merit in the prisoner's contentions, the appeal will be dismissed for want of the certificate of probable cause. Presley v. Peppersack, 4 Cir., 227 F. 2d 325; Parker v. Warden, Maryland Penitentiary, 4 Cir., 198 F. 2d 72; Tyson v. Swenson, 4 Cir., 198 F. 2d 308; Hanson v. Warden, Maryland Penitentiary, 4 Cir., 198 F. 2d 470; Hobbs v. Swenson, 4 Cir., 199 F. 2d 268; Harris v. Swenson, 4 Cir., 199 F. 2d 269; Cumberland v. Warden, Maryland Penitentiary, 4 Cir., 227 F. 2d 310.

The principal contentions arise out of the circumstances surrounding receipt of the verdict in the trial court. The defendant was tried upon an indictment for murder, and the jury brought in a verdict in the following form:

> "The unanimous decision of the Jury is Life imprisonment.
>
> R. H. Harvey — Foreman."

The trial judge refused to accept the verdict in that form, but rewrote the verdict in the following language:

> "We the jury on the issues joined find the defendant guilty of murder in the first degree as charged in the indictment and fix his punishment at life imprisonment in the penitentiary."

The foreman of the jury signed the revised form of the verdict.

[2] The prisoner contends that one of the jurors had absented himself at the time the irregular verdict was submitted and the revised form of the verdict was signed by the foreman of the jury. In support of his contention, he points to the final order which listed the names of only eleven jurors. Thereafter, however, a motion was filed in the original criminal proceeding to correct the record by adding the name of one Kendrick Duncan to the list of jurors. A hearing was had pursuant to an order to show cause, at which the defendant and his court-appointed counsel were both present. Testimony was taken and, thereafter, an order was entered "nunc pro tunc," as of the date of the original final order, adding the name of Duncan to the list of jurors and correcting what was found to have been an inadvertent omission in the preparation of the original order. There had been doubt under the laws of the State of Virginia of the power of a trial court of that State thus to correct inadvertent omissions in its records, but that doubt was removed by the decision of the Supreme Court of Appeals of Virginia in Council v. Commonwealth, 198 Va. 288, 94 S. E. 2d 245. The inadvertent omission of the name of one juror in the final order, after correction, does not preclude the subsequent finding based upon abundant evidence, that all twelve jurors were in fact present at all relevant times during the trial. Council v. Commonwealth, supra; C. C. Bradley v. W. Frank Smyth, Jr., 4 Cir., 255 F. 2d 45.

Thereafter, upon petition for a writ of habeas corpus in the state court, a further hearing was held before another judge during which the prisoner was contending, among other things, that the twelfth juror was not present and that the revised form of the verdict was not affirmed by the jury as a whole. Again, the defendant was present in person and was represented by counsel. The state court found from the testimony that all twelve jurors were in fact present and

together at all relevant times during the trial, and that all twelve affirmed as a group the revised form of verdict, an individual poll of the jurors having been specifically waived by the defendant's counsel.

[3, 4] Under the laws of Virginia, the jury is required to fix the punishment of one convicted of a homicide within the limits prescribed by the statutes for the different offenses. Life imprisonment is permissible upon a conviction of murder in the first degree, but is not permissible for any lesser offense. It is plain, therefore, that the jury, instructed as to their duty to prescribe the punishment, intended to find the defendant guilty of murder in the first degree, a finding which appears to have been abundantly supported by the testimony. The change in the form of the verdict, therefore, was the correction of a formal omission and not a change in the substantive finding of the jury. Hobson v. Youell, 177 Va. 906, 15 S. E. 2d 76; Zedd v. Jenkins, 194 Va. 704, 74 S. E. 2d 791; In re Eckart, 166 U. S. 481, 17 S. Ct. 638, 41 L. Ed. 1085.

[5] The two principal contentions having been fully considered after hearings in the state courts, the District Court was not required to grant the writ and hold a further hearing to redetermine the factual issues already resolved in the state court proceedings upon the basis of adequate records and testimony. Brown v. Allen, 344 U. S. 443, 73 S. Ct. 397, 97 L. Ed. 469.

[6, 7] The petitioner sought to raise in his petition in the District Court other points which do not clearly appear to have been raised by him in the state courts. He attacks the sufficiency of his personally selected counsel, who conducted his defense in the original trial, principally because his coun-

sel failed to have the prisoner take the witness stand and did not specify the grounds of his motion to set aside the verdict. He also contends that he should have been granted additional time, after the verdict, in which to produce additional witnesses in his behalf, but he did not identify the prospective witnesses or suggest the nature of the testimony he hoped to obtain. Clearly these contentions are without merit. The prisoner had been charged with the murder of the husband of his paramour and the witnesses offered in his behalf had sought not to exculpate the defendant but to implicate the paramour as having some moral responsibility for the crime. Obviously, it cannot be said that counsel's determination, as a matter of trial tactics, not to put his client upon the witness stand, under these circumstances, converts the trial into a farce or a mockery of justice. Indeed, it may be the wise or even the only prudent course to take. Having had a full trial, the defendant clearly is not entitled to a retrial upon the basis of an unsupported statement that he would like additional time to produce unidentified witnesses whose possible testimony was not disclosed.

Since there appears to be no merit in the prisoner's contentions, the members of this Court decline to issue a certificate of probable cause and the appeal will be dismissed.

Appeal dismissed.

## APPENDIX IV

*VIRGINIA:*

In the Hustings Court of the City of Richmond, Part II, the 12th day of November 1956.

COMMONWEALTH OF VIRGINIA, *Plaintiff,*

against

STUART W. NEWSOM (W), *Defendant.*

### Order

Stuart W. Newsom (w), who was heretofore on April 10, 1953, convicted in this Court of murder and sentenced to life imprisonment in the Penitentiary, was this day led to the bar in the custody of the Sergeant of the City of Richmond, and also came McC[redacted]igan, his attorney previously appointed by the Court to represent him in this proceeding; whereupon, the Court heard the evidence on behalf of the Commonwealth and the defendant upon the Rule To Show Cause entered herein on November 1, 1956 and made returnable to this day.

Counsel for the defendant moved the Court to provide a Court Reporter at the expense of the Commonwealth to record these proceedings, which Motion the Court overruled, and to which action of the Court the defendant, by counsel, objected and excepted.

And it appearing from the evidence that the order heretofore entered herein on April 10, 1953, is defective in that it did not name Kendrick Duncan as one of the jurors sworn to try this case; and it further appearing to the Court from the Clerk's original Jury List used by counsel for the Commonwealth and the defendant for the purpose of striking jurors

from the panel of twenty (20) that Kendrick Duncan was one of the jurors sworn to try this case together with the other eleven jurors named in the order of April 10, 1953; and it further appearing from the Jury Allowance Book that the said Kendrick Duncan was allowed payment for service on the said day; and it further appearing that the aforementioned quasi record is corroborated (although the Court is of opinion that such corroboration is unnecessary) by the oral testimony of the said Kendrick Duncan that he did in fact serve upon the said jury;

It is, therefore, ordered that the order heretofore entered herein on April 10, 1953, convicting the accused, Stuart W. Newsom, be, and the same is hereby, amended and corrected so as to read as follows, and entered nunc pro tunc as of April 10, 1953:

"Stuart W. Newsom (w), who stands charged with a felony, to-wit: That on the 14th day of June, 1952, he did feloniously kill and murder one James F. Brown, was this day led to the bar in the custody of the Sergeant of the City of Richmond, and also came Percy S. Smith, his attorney. The defendant, being arraigned of said offense, refused to plead. Whereupon, the Court entered a plea of not guilty on behalf of the defendant.

Whereupon, the Sergeant, having returned the Venires Facias, drawn in the manner prescribed by law, and of the number so summoned and attending, a panel of twenty names, free from exceptions for the trial of the defendant was made up and completed. And the Assistant Attorney for the Commonwealth and the attorney for the defendant, having alternately, beginning with the Assistant Attorney for the Commonwealth, each struck from the said panel, the names of four of the said jurors, the remaining twelve constituted the jury for the trial of the defendant, to-wit: Leon

Adkins, Fred S. Brummer, Linwood W. Cobb, Robert H. Harvey, James M. Gary, Walker S. Smith, Rudolph C. Hassell, Harry Sachs, William G. Smith, Kendrick Duncan, George W. Mayo and Chas. H. Tate, who were sworn the truth of and upon the premises to speak, and having fully heard the evidence, the instructions of the Court, and arguments of counsel, were sent to their room in the custody of the City Sergeant to consult of their verdict, and after some time returned into Court with a verdict as follows: "We the jury on the issues joined find the defendant guilty of murder in the first degree as charged in the indictment and fix his punishment at life imprisonment in the penitentiary."

Whereupon, counsel for the defendant moved the Court to set aside the verdict but gave no grounds in support of his motion. Whereupon, the Court overruled the defendant's motion and the defendant by counsel excepted to the Court's ruling.

Whereupon, it being demanded of the said Stuart W. Newsom, if anything for himself he knew or had to say why the Court should not now proceed to pronounce judgment against him according to law, the said defendant arose and stated to the Court that he should not be sentenced as his attorney had failed to introduce certain evidence on his behalf and asked that he be given ten days within which to produce such evidence, which request the Court denied and to which ruling the defendant objected and excepted. Whereupon, it is ordered by the Court that the said Stuart W. Newsom be confined in the penitentiary for and during his natural life, this being the period by the jurors ascertained.

It is ordered that the Sergeant of the City of Richmond, when required so to do, deliver the said Stuart W. Newsom from the jail of this City to the Superintendent of the Peni-

tentiary, in said Penitentiary to be confined and treated in the manner prescribed by law.

It is further ordered by the Court that the Commonwealth do recover of the said Stuart W. Newsom her costs incident to this proceeding.

Whereupon, the said defendant was remanded to jail."

To which action of the Court, the defendant objected and excepted, and the defendant in person stated his intention to apply for a writ of error and requested the Court to appoint an attorney to prosecute such application. Wherefore, the Court doth designate Arlin F. Ruby, Attorney at Law, to represent the defendant in such application.

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## APPENDIX V

*VIRGINIA:*

In the Hustings Court of the City of Richmond, Part II, the 28th day of April 1960.

COMMONWEALTH OF VIRGINIA, *Plaintiff,*

against

STUART W. NEWSOM, *Defendant.*

### Order

The Court, heretofore having received direct from the petitioner, Stuart W. Newsom, a petition for a Writ of Error Coram Vobis, the Court, treating the same as a written motion in the nature of a petition for a writ of error coram vobis under section 8-485 of the Code, doth order

the same filed; and the petitioner is permitted to proceed in forma pauperis.

And upon a consideration of the same and being of opinion that the Petition fails to state a case for issuance of the writ or granting of the motion (see Dobie vs. Commonwealth, 198 Va. 762) the Court doth deny the said Petition; to which action of the Court an objection and exception is noted on behalf of the petitioner, Stuart W. Newsom.

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## APPENDIX VI

*VIRGINIA:*

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 10th day of October, 1960.

The petition of Stuart W. Newsom for a writ of error to a judgment rendered by the Hustings Court of the City of Richmond, Part II, on the 28th day of April, 1960, in a certain proceeding then therein depending, wherein Commonwealth of Virginia was plaintiff and the petitioner was defendant, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition, and refuse said writ of error, the effect of which is to affirm the judgment of the said hustings court.

PETITION NOT PRINTED

# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

## No. 116

STEWART W. NEWSOM,

*Petitioner,*

—v.—

W. FRANK SMYTH, JR., Superintendent of Virginia State Penitentiary.

## REPLY BRIEF FOR PETITIONER

Petitioner files this Reply Brief in order to incorporate herein as Appendix B letter from Petitioner to counsel, dated December 5, 1960, indicating clearly that Petitioner was indigent at the time he requested counsel for the purpose of taking an appeal from his original conviction.

Respectfully submitted,

ARMISTEAD L. BOOTHE
711 Princess Street
Alexandria, Virginia
*Counsel for Petitioner*

**Appendix B**

CENSORED
L.L.B.

December 5, 1960

Mr. Armistead L. Boothe
Attorney at Law
711 Princess Street
Alexandria, Virginia

Dear Mr. Boothe:

I received your recent letter and was very pleased to hear from you.

I am actually looking forward to receiving a copy of the Attorney General's Brief in rebuttal to our cause.

As per your request, when I arrived at the penitentiary in 1953, as I remember it, I had just fifty dollars and three cents ($50.03), and at the time that I attempted to secure the services of an attorney to perfect my appeal, I had approximately Forty Dollars ($40.00), which constituted my total assets. This was the reason for my failure to secure assistance and why I requested the Court to appoint counsel to represent me. I am sure that a check of the prison records will reveal the amount that I had upon my arrival here in April of 1953. I did make efforts though, to obtain funds, but was unsuccessful.

Trusting this is the information you wanted, I remain,

Very truly yours,

/s/ Stewart W. Newsom
Stewart W. Newsom
# 63646 236-B
500 Spring Street
Richmond, Virginia

# SUPREME COURT OF THE UNITED STATES

No. 116.—October Term, 1960.

| | |
|---|---|
| Stuart W. Newsom, Petitioner, v. W. Frank Smyth, Jr., Superintendent of Virginia State Penitentiary. | On Writ of Certiorari to the Supreme Court of Appeals of the Commonwealth of Virginia. |

[March 27, 1961.]

Per Curiam.

A writ of certiorari to review the judgment of the Supreme Court of Appeals of the Commonwealth of Virginia was granted in this case, 363 U. S. 802, in the belief that it duly presented for the Court's consideration the question whether the Due Process Clause of the Fourteenth Amendment to the Federal Constitution requires that the State must, in appropriate circumstances, appoint counsel to assist an indigent prisoner under sentence of conviction for a state crime in prosecuting his appeal. After hearing oral argument and upon full consideration of the case, we find that the record does not adequately establish that the Virginia court found or was required to find that there was presented to it the federal claim on which the case was brought here. The case thus fails to present a federal question, and the writ must be dismissed as improvidently granted.

*So ordered.*

# SUPREME COURT OF THE UNITED STATES

No. 116.—October Term, 1960.

| | |
|---|---|
| Stuart W. Newsom, Petitioner, v. W. Frank Smyth, Jr., Superintendent of Virginia State Penitentiary. | On Writ of Certiorari to the Supreme Court of Appeals of the Commonwealth of Virginia. |

[March 27, 1961.]

Mr. Justice Douglas, with whom The Chief Justice and Mr. Justice Black concur, dissenting.

In April 1953 petitioner was found guilty of murder in the first degree and was sentenced to life imprisonment in the state penitentiary. At the trial, petitioner had been represented by counsel, although at allocution he had complained that his counsel had failed to present relevant evidence. On April 18, 1953, petitioner wrote to the trial judge at his trial,[1] noting an appeal within the time allowed therefor under Virginia law. In a second letter written five days later,[2] petitioner requested "that you appoint me counsel to appeal my case to the State Supreme Court of Appeals." To neither letter did he receive any reply. He took no further steps to appeal his conviction.

[1] April 18, 1953

Honorable M. Ray Doubles
Hustings Court Part II
Richmond 24, Virginia

"Your Honor:

"In lue of any known action on the part of my attorney, I am taking this method of respectfully noting an appeal from the 'life sentence' imposed upon me in your Court on April 10, 1953.

"I will within the alloted time attempt to get Counsel to complete the appeal."

[*Footnote 2 is on p. 2.*]

In January 1959 he filed in the Virginia court a petition for a writ of *habeas corpus*. The Law and Equity Court of Richmond concluded that the petition did not allege "a failure of the trial court to accord to the accused those procedural safeguards guaranteed to him by the state and federal constitutions," and accordingly denied the writ. Petitioner sought review by the Supreme Court of Appeals, and that court refused to issue a writ of error. Then petitioner sought review here, and certiorari was granted. 363 U. S. 802.

The question raised by petitioner is substantial: Does the Federal Constitution obligate the several States to appoint counsel to assist indigent defendants to pursue whatever appellate remedies the States may offer? Cf. *Griffin* v. *Illinois*, 351 U. S. 12.

The opinion of the Law and Equity Court of Richmond discussed the problem of this case in those terms. After an extended discussion of the right of indigents to counsel that court quoted from 55 A. L. R. 2d, at p. 1085, 2 L. ed. 2d, at p. 1649, the following:

> ". . . Thus, the establishment of the rule that a state must, as a matter of federal constitutional law, provide indigents with the assistance of counsel to prosecute appeals in criminal cases would appear to be no more than a logical extension of the Griffin doctrine."

---

[2] April 23, 1953

"Honorable Mr. Ray Doubles
"Hustings Court Part II
"Richmond, Va.

"Your Honor:

"Due to circumstances beyond my control, I have been unable to complete arrangements with an attorney to complete my appeal.

"Therefore, I respectfully request that you appoint me counsel to appeal my case to the State Supreme Court of Appeals."

It then added:

> "Whether this view be correct or incorrect is, of course, the question in the instant case."

And the Supreme Court of Appeals in refusing a petition for writ of error said that the judgment was "plainly right." Regardless of whether the courts below "were required to find" that petitioner had adequately stated his federal claim, those courts in fact did so find as the adjudication was on the issues exposed in the record.[3]

The question whether the Equal Protection Clause of the Fourteenth Amendment requires appointment of counsel for indigents to represent them on appeal from state court judgments of conviction is present and ripe for decision. I dissent from the dismissal of the certiorari.

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[3] The judgment of the Supreme Court of Appeals read: "The petition of Stuart W. Newsom for a writ of error . . . having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of the opinion that the said judgment is plainly right, doth reject such petition, and refuse said writ of error, the effect of which is to affirm the judgment [of the court below]."